No. 69.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

PANHANDLE EASTERN PIPE LINE COMPANY, *Appellant*,

v.

THE PUBLIC SERVICE COMMISSION OF INDIANA, ET AL., *Appellees*.

BRIEF FILED ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AMICUS CURIAE.

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OPINION BELOW.

The opinion of the Supreme Court of Indiana is reported in 71 N. E. (2d), page 117.

PRELIMINARY STATEMENT.

The National Association of Railroad and Utilities Commissioners, hereinafter called the Association, is a voluntary association embracing within its membership the members of the regulatory commissions and boards of the several states of the United States, except two, one of which has no state regulatory commission.

By the Constitution of the Association the President or the Executive Committee of the Association may direct the General Solicitor to appear on behalf of the Associa-

tion (as distinguished from a particular commission represented in its membership) in any proceeding pending before any court or commission in which, in the judgment of such President or Committee, appearance on behalf of the Association should be made. This brief is offered for filing on behalf of said Association by direction of the President and of the Executive Committee in the general public interest.

The interest of the Association in this case arises by reason of the fact that the primary issue is whether the Indiana Public Service Commission, hereinafter called the Commission, is precluded by reason of the Commerce Clause of the Constitution, from regulating direct sales to industrial consumers situated in Indiana by an interstate natural gas pipe line company.

If, by reason of the Commerce Clause, such regulation is held invalid in Indiana, the decision will serve as a precedent for a like ruling in other states served by Panhandle Eastern Pipe Line Company, hereinafter called Panhandle, and other pipe line companies. More than this, if the order in question is not sustained, a hiatus in regulation will be immediately created, for sales to industrial consumers are expressly exempt from federal regulation under the Natural Gas Act. In the opinion of this Association, a hiatus in regulation, whereby a phase or segment of public utility operations is enabled to escape all regulation, is not in the public interest.

The Association has participated, as *amicus curiae*, in the prior proceedings herein, by filing a brief in the Supreme Court of Indiana and by filing a brief and participating in the oral argument before the trial court.

STATEMENT OF THE CASE.

This proceeding involves the validity of an order of the Commission, dated November 21, 1945, requiring Panhandle to file with the Commission certain tariffs, annual reports, and accounting data.

The Commission order under review was rendered in a proceeding begun by the Commission, on its own motion, on October 13, 1944. The purpose of the proceeding was to determine whether Panhandle is failing or has failed to comply with, abide by and conform with any applicable provisions of the Public Service Commission Act or the orders and regulations of the Commission. In particular, the inquiry was directed to an investigation of the facts and circumstances surrounding Panhandle's sale of natural gas to the Anchor-Hocking Glass Corporation, hereinafter called Anchor-Hocking, an industrial consumer of natural gas within the State of Indiana.

Hearings were held in November, 1944, and January and March, 1945. The evidence showed that approximately 112,000 consumers in Indiana are supplied with gas which is transmitted into that state, by Panhandle, from the Amarillo Gas Field in the Texas Panhandle and the Hugeton Gas Field in southwestern Kansas. At the time this proceeding was pending before the Commission, the company was making direct sales to seven employees for domestic use, and to Anchor-Hocking, for its own industrial use. All other sales in Indiana by Panhandle, at that time, were sales to local distributing companies and municipalities, for resale to ultimate consumers. The 112,000 consumers referred to above receive Panhandle gas through these local distributing companies. (R. 46) At the time of the Commission proceeding, Panhandle had entered into arrangements to provide direct industrial service to a plant operated by E. I. Du Pont de Nemours near the Town of Fortville, Indiana. (R. 46). This arrangement was consummated subsequent to entry of the Commission order and hence was not dealt with in the Commission order and is not involved in this court review.

Except for domestic sales to seven employees, Anchor-Hocking was the only ultimate consumer receiving direct service from Panhandle in Indiana during the pendency of the Commission proceedings. Anchor-Hocking is en-

gaged in manufacturing glassware. Nine other manufacturers of glass obtain their supply of natural gas from Central Indiana Gas Company, one of the distributing companies served by Panhandle. (R. 48)

The stipulated evidence also shows that it is the purpose and intention of Panhandle in the future to make contracts for supplying gas to large industrial consumers direct with such consumers. These industrial consumers are now served by distributing companies which obtain their supply, for residential, commercial and industrial distribution, from Panhandle. Not taking into account the industrial customers indirectly served by Kentucky Natural Gas Corporation, 252 industrial customers are served by the distributing companies dependent upon Panhandle for their supply. (R. 50) Panhandle believes sales to these industrial customers to be free from all regulation, federal or state.

If Public Service Company of Indiana, one of the distributing companies in question, were to lose all of the gas revenues classified as industrial sales, by reason of Panhandle taking over this business, it would mean a loss of more than $1,000,000 annually in gross revenues, and a loss in net operating income, before federal income taxes, of $293,730.22 annually. This would require a substantial increase in the distributing company's domestic and commercial rates. (R. 144)

In the case of another distributing company, Central Indiana Gas Company, loss of its industrial customers would reduce net revenues by $514,206.67 annually, necessitating a substantial increase in Central's domestic and commercial rates. The same result would follow if Kokomo Gas & Fuel Company, another distributing company, were to lose its industrial customers to Panhandle. (R. 146)

Panhandle sought a review of the Commission's order, referred to above, by the Randolph Circuit Court upon the ground that the company was not subject to the jurisdiction of the Commission. That Court, on May 11, 1946, entered judgment vacating, setting aside and perpetually

enjoining enforcement of the Commission order. The Court based its judgment upon the ground that the Commission order unlawfully regulates and burdens interstate commerce, contrary to Article I, Section 8(3), of the Constitution of the United States.

Upon appeal to the Supreme Court of Indiana, the judgment of the trial court was reversed.

THE QUESTION PRESENTED.

Assuming Panhandle's direct sales to industrial consumers to be interstate in character, does state regulation thereof violate the Commerce Clause?

SUMMARY OF ARGUMENT.

I. (Pages 7 to 36). The states are free, in so far as the Commerce Clause is concerned, to make laws affecting or regulating interstate commerce, provided Congress has not acted to prevent such state regulation; and provided the subject matter of the regulation is primarily a matter of local concern not requiring national uniformity. *Minnesota Rate Cases, Simpson* v. *Shepherd*, 230 U. S. 352, 399. Congress has not acted to prevent state regulation of direct industrial sales by interstate pipe line companies.

The facts of the instant case show that the industrial consumer sales in question are primarily matters of local concern, not requiring national uniformity of regulation. Panhandle is carrying out a definite plan to take over most of the industrial consumers now served by local distributing companies dependent upon Panhandle gas. This jeopardizes the efficient, non-discriminatory and economical operation of local distributing companies to the detriment of the general public receiving service from such companies. If this may be done by Panhandle, it may be done by any interstate gas utility company anywhere, and effective state regulation of the business of supplying gas to the public becomes impossible. The local public inter-

est, accordingly, requires that such direct sales be regulated.

This regulation cannot be well administered from the federal level. Moreover, there is no national interest in having direct industrial sales go unregulated. Cases relied upon by Panhandle as precluding state regulation under such circumstances are clearly distinguishable. State regulation of interstate sales to ultimate consumers was sanctioned in *Pennsylvania Gas Company* v. *Public Service Commission*, 252 U. S. 23.

II. (Pages 37 to 60). It has been the long-standing and well-considered policy of Congress to permit the states to regulate local interstate utility service. This was the purpose of Congress in exempting industrial sales from federal regulation, as revealed by the legislative history of the Natural Gas Act. *Public Utilities Commission* v. *United Fuel Gas Company*, 317 U. S. 456; *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591. This accords with the similar purpose of the exemption provisions contained in the Communications Act of 1934 and in the Federal Power Act. If Panhandle's contention as to the effect of the Commerce Clause is valid, then state regulation of direct sales and services rendered across state lines is inhibited, not only as to gas, but as to electric energy and to telephone exchange service and as to every other character of local utility service so rendered. The Supreme Court has never heretofore failed to sustain state regulation of sales to ultimate consumers of whatever kind or character. The tendency of the later decisions is especially pronounced in this direction. *Prudential Insurance Company* v. *Benjamin*, 328 U. S. 408.

ARGUMENT.

I.

Panhandle's Direct Sales to Industrial Consumers Are Subject to State Regulation Even Though Assumed to Constitute Interstate Commerce.

A. Such Sales May Be Regulated Under the Principle That, Where the Subject Matter of Regulation is Primarily a Matter of Local Concern Not Requiring National Uniformity, the States May, in the Absence of Conflicting Federal Legislation, Make Laws Affecting or Regulating Interstate Commerce.

(1) The Basic Constitutional Principle.

The Commerce Clause does not prohibit all state regulation of interstate commerce. A long line of Supreme Court decisions, beginning with Chief Justice Marshall's opinion in *Wilson* v. *Black Bird Creek Marsh Company*, 2 Pet. 245, 7 L. ed. 412, rendered in 1829, and followed in the leading case of *Cooley* v. *Port Wardens*, 12 How. 299, 319, 13 L. ed. 996, 1005 (1851), has established beyond question the right of the states, under certain circumstances and notwithstanding the Commerce Clause, to make laws affecting or regulating interstate commerce.

The existence of this right and the circumstances under which it may be exercised are clearly stated in this frequently-quoted declaration by Mr. Justice Hughes, later Chief Justice, in the *Minnesota Rate Cases, Simpson* v. *Shepherd*, 230 U. S. 352, 399 (1913):

> ". . . It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise

of its authority overrides all conflicting state legislation. (citing cases)"

This principle has been reasserted and applied in Supreme Court decisions too numerous to cite. Through the years, the rule has lost none of its original significance, as was well illustrated by the application thereof in *South Carolina State H. Department* v. *Barnwell Bros.*, 303 U. S. 177 (1938), where the Court, in holding constitutional a state statute prescribing motor truck length, width and weight limitations said:

> "While the constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure, it did not forestall all state action affecting interstate commerce. Ever since Wilson *v.* Black Bird Creek Marsh Co., 2 Pet. 245, 7 L. ed. 412, and Cooley *v.* Port Wardens, 12 How. 299, 13 L. ed. 996, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints." (p. 185)

This same principle was last repeated by the Supreme Court no longer ago than June, 1945, when the late Chief Justice Stone, in *Southern Pacific Company* v. *Arizona*, 325 U. S. 761, after repeating almost exactly the above-quoted language of the *Barnwell case*, added:

> ". . . When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation

has been generally held to be within state authority. (citing cases)" (page 767)

The Court below, after a review of the authorities, gave full recognition to this basic constitutional principle. The Court said:

> "But we need not decide whether the Anchor-Hocking business and prospective sales direct to other large industrial consumers are interstate or intrastate by mechanical standards. Even if they are interstate they still may be subject to state regulation under some circumstances. It has long been established that the power of Congress over interstate commerce is not exclusive. If the Federal Government has not elected to exercise its power under the commerce clause, and if the transaction is not of such nature as to require uniform regulation on a national basis, and if it is so local in its nature and implications that local needs outweigh national interest, then even though interstate, according to mechanical tests, the state may intervene and regulate (citing cases)." (R. 201, 71 N. E. (2d) 117, 222.)

It is plain that the states are free, in so far as the Commerce Clause is concerned, to make laws affecting or regulating interstate commerce, provided Congress has not acted to prevent such state regulation, and provided the subject matter of the regulation is primarily a matter of local concern not requiring national uniformity.

Congress has not acted to prevent state regulation of direct industrial sales, either by providing for federal regulation or by exempting such sales from state regulation. Section 1(b) of the Natural Gas Act expressly excludes industrial sales from federal regulation and nowhere in that Act or any other federal statute is state regulation of such sales prohibited.

The only remaining question, therefore, is whether such industrial sales are primarily matters of local concern within the meaning of the constitutional principle referred to above.

(2) THE INDUSTRIAL CONSUMER SALES IN QUESTION ARE PRIMARILY MATTERS OF LOCAL CONCERN NOT REQUIRING NATIONAL UNIFORMITY OF REGULATION.

(a) Whether the local or national interest predominates is a question of fact.

Whether a particular subject matter of state regulation is primarily a matter of local concern is almost wholly a question of fact, to be determined by weighing all the practical considerations which argue for and against such a conclusion. The function of the courts in this regard was well stated in the very recent case of *Prudential Insurance Company* v. *Benjamin*, 328 U. S. 408, decided June 3, 1946, which, with its companion case of *Robertson* v. *California*, 328 U. S. 440, decided the same day, sustained both state taxation and regulation of interstate insurance business. In the *Prudential case*, the court made this very clear statement:

> "... concurrently with the broadening of the scope for permissible application of federal authority, the tendency also has run toward sustaining state regulatory and taxing measures formerly regarded as inconsonant with Congress' unexercised power over commerce, and to doing so by a new, or renewed, emphasis on facts and practical considerations rather than dogmatic logistic. These facts are of great importance for disposing of such controversies. For in effect they have transferred the general problem of adjustment to a level more tolerant of both state and federal legislative action." (page 420)

Much the same view was expressed in *Southern Pacific Company* v. *Arizona*, *supra*, where the court said (page 770):

> "... in their application state laws will not be invalidated without the support of relevant factual material which will 'afford a sure basis' for an informed judgment. Terminal R. Assoc. *v.* Brother-

hood of R. Trainmen, *supra*. (318 U. S. 8 . . .); Southern Ry. Co. *v.* King, 217 U. S. 524 . . ."

We turn, then, to a consideration of the "revelant factual material" which will afford a basis for judging whether the local or national interest predominates here, and, accordingly, whether state regulation is, or is not, compatible with the Commerce Clause.

(b) There is a general local interest in adequate gas supplied at reasonable rates.

At the outset we know that it is a matter of local concern to the people of Indiana that natural gas be provided for their domestic, commercial and industrial uses in adequantities and at reasonable and non-discriminatory rates. This is the purpose behind the Indiana statutes authorizing the regulation of gas utilities (Secs. 54-112, et seq. Burns Indiana Statutes Annotated, 1933), just as in the case of all other state utility regulatory statutes.

(c) Effective local regulation is impossible if pipe line companies have an uncontrolled right to take industrial customers away from local distributing companies.

The local public interest will be adversely affected, and the purposes of general regulatory statutes thwarted, if direct sales by interstate pipe line companies to industrial consumers are exempt from state regulation, and, at the same time, are unregulated by the federal government. This is because the character of the gas industry is such that it requires regulation in the public interest in its entirety. It is impossible to protect the public interest by regulation extending to a part only. To avoid wasteful duplication in facilities and services, and to promote economical and efficient operation, in a given area, the public good may require that a particular utility shall be given a monopoly to serve customers, and that any other

utility seeking to serve in the same area shall be denied authority altogether, or granted only limited authority, on terms consistent with the public interest.

Recognition of this principle underlies the provision of law governing the granting of certificates of convenience and necessity under federal law and under state laws. Regulation of engagement in business demands regulation as to all. It simply cannot be administered in such a way as to protect the public interest unless it extends to the whole business. The intrastate part cannot be regulated, and the interstate part left free, because the unregulated operators will eat up the choicest business of the regulated operators, by low rates made to secure that business, leaving to the regulated operators only the least profitable customers. Inevitably, losses to such regulated customers must be covered by rates imposed upon the general public.

There is no escape from the conclusion that the public interest imperatively requires regulation of the engagement in the business of selling to consumers by some government, either state or federal. As to the interstate business, regulation might be undertaken by the federal government, but it would be difficult, and less satisfactory than if supplied by state authorities regulating the intrastate business. Regulation, however, is indispensable, and until supplied by the federal government must be supplied by the state, unless the public interest is to suffer, and state regulation of intrastate business is to be broken down, or handicapped and impeded, and made to produce in equitable results.

This is the very situation presented in the instant case, and is why local gas distributing companies have intervened. Panhandle definitely plans to take over most of the industrial consumers now served by distributing companies dependent upon Panhandle gas. Its acknowledged purpose in pursuing this plan is to escape all regulation as to industrial sales. The accomplishment of this plan

will adversely affect the stability of the connecting distributing companies and will be unavoidably reflected in higher domestic and commercial gas rates for service to 112,000 Indiana consumers.

The efficient and economical operation of local distribution systems is necessarily dependent upon the maintenance of a proper balance between its domestic, commercial and industrial customers. The large quantities of gas purchased by industrial customers provide a substantial and indispensable part of the gross revenue of any such local distribution system. With this revenue, such distribution systems have the financial means and stability to render more adequate and less expensive service to domestic and commercial customers than would otherwise be possible. Deprived of their industrial customers, local distribution systems would be crippled in serving their remaining customers, or compelled to serve them at much higher rates.

The Commission made full findings to this effect on this precise point, saying, in its Order: (R. 145)

> "The fact that the distributing companies served natural gas to all three classes of gas consumers, i.e., industrial, commercial and domestic, has made possible a high standard of service at lower rates to the consumers in each of the three classes than would have been possible if only one of the classes had been served. It has meant that the residential and commercial consumers have had the benefit of natural gas which would have been denied them unless the distributing companies' business had included service to all three classes of consumers. The installation of facilities to serve industrial consumers has made possible the development of domestic uses, including cooking and water heating, the high B. T. U. gas for house heating and the use of gas for commercial cooking purposes by restaurants, hotels and others. All of these services under old methods were prohibitive in cost or the gas was not available in the quantities in which the customers wished to use it, due to the inadequacy of facilities and of the supply of gas. It was through the development by the distributing companies of the

industrial business that they have been able to improve materially the over-all load factor of gas purchases. This has also enabled the distributing companies to spread their fixed costs, such as interest, taxes and depreciation, which are constant in everyday operation, over a larger number of units of service, which automatically has given the benefit of that condition and fact to each of the three classes of consumers and has made possible the development of rates for service which were attractive not only to one of the three classes but to each of them; all of which has had the effect of promoting greater public interest in the area served by these distributing companies in the use of natural gas and in advancing the public welfare in those areas. (Pages 60, 61, 63, 75, 82 of Transcript.)"

The adverse effect which reduced industrial sales would have upon domestic and commercial customers was clearly recognized in the opinion of the Court below where it was said:

"... Local utilities whose costs per unit of gas have been increased by the reduced volume of sales caused by the direct deliveries from the pipe lines will be entitled to higher rates and resulting price disparity unfavorable to customers of the local utilities will tend to break down the state system of regulation which will have fixed, and appear to be responsible for, the unfavorable local rates. This probable result, it seems to us, in (is) a weighty consideration in balancing national interest against local need." (R. 208, 71 N. E. (2d) 117, 125)

By regulating direct industrial sales, the local interest of the public can be protected from the ill effects which would result if interstate pipe line companies were free to reach in and grab industrial customers away from the local distributing companies serving that area. This does not mean that all direct service by pipe line companies to industrial plants would be arbitrarily prohibited. It means only that before a pipe line company could take over such

an industrial customer, the Commission would have an opportunity to determine whether such a course would be inimical to the local public interest, and to grant or deny the application according to such determination.

(d) The local interest will be jeopardized if pipe line companies are free to charge discriminatory rates.

Nor does the local concern in regulating sales to industrial consumers end when it is determined what company should render such service. Industries served by a pipe line company may be in direct competition with other industries in the same locality being served by a local distributing company. How can the local public interest in maintaining non-discriminatory rates be achieved, if a pipe line company is free to render service to an industrial plant on a basis or at rates which are unduly preferential to that plant and unreasonably prejudicial to the competing plant? Similar discriminations between two plants within the same state, served by the same or different pipe line companies, would likewise be wholly beyond remedy, if the state is to be denied the power to regulate such sales.

The importance of this consideration was forcibly pointed out in the opinion of the Court below, where it was said:

> "... The State of Indiana, in its scheme of utility regulation, controls sales to all other consumers of gas brought into Indiana through interstate pipe lines. The sales by local distribution utilities are regulated by the state. The record shows that many industrial consumers are thus provided with natural gas from exactly the same source. If sales to some are regulated by the state and others are free from regulation confusion is natural.
>
> "Also if Indiana may not regulate the sale of natural gas from interstate pipe lines direct to large industrial consumers in Indiana, such sales and deliveries will not be regulated at all under present law. The result will not only be that the pipe line owners, free of regulation, will have advantage over regulated local utili-

> ties in competing for business from large industrial consumers, but the customers of the pipe line may be given advantage over the customers of the local utilities. . . ." (R. 208, 71 N. E. (2d) 117, 125)

It, of course, can be argued that industrial plants located in Indiana also compete with industries in other states, and that there is no way to prevent discriminatory treatment as between two industries served by the same pipe line company where one of such industries is located in another state. Assuming this to be true, it does not constitute a sound reason why the state should not provide nondicriminatory conditions within its own territory.

Such discrimination between citizens of different states by a company rendering service across state lines is likewise possible, to the same extent, in cases where gas or other utility service is rendered to competing wholesale or retail merchants, or competing farmers, or other competing customers, receiving service under established commercial or domestic rates,—and yet sales for commercial or domestic services are admittedly of such local character as to be subject to state regulation, when not regulated by Congress, notwithstanding the service may be rendered across state lines.

If the prevention of discrimination as between competing industries located in different states becomes important enough, Congress can always vest the federal regulatory agency with power to deal with the situation. If and when Congress does so, conflicting state regulation will be superseded. Unless and until Congress does so, the states should be free to meet the problem of discrimination and prejudice within their own borders.

In this connection it is especially important to bear in mind that local regulation of direct industrial sales is necessary not only to protect the customers receiving such *industrial* service, but also, and more important, to make possible adequate and effective regulation of local distribution service to all of the general public in the same area.

Stated differently, the proposed state regulation of direct industrial sales, now under review, while affecting interstate commerce, is only incidental to a general plan of local intrastate regulation. In such cases the Supreme Court has uniformly sustained the regulation as a matter of local concern not requiring national uniformity. The basis for this reasoning lies in the fact that a general plan of local regulation will often be completely defeated if it is not permitted to control incidental interstate phases which may be involved.

The application of this principle was well stated in the recent *Robertson case, supra*, where the court said:

> "Furthermore, here, as in the cited cases, 'unless some measure of local control is permissible,' the activities and their attendant evils 'must go largely unregulated,' unless or until Congress undertakes that function. California v. Thompson, supra (313 U. S. at 115, 85 L. ed. 1222, 61 S. Ct. 930). And in view of the well-known conditions of competition in this field, such a result not only would free out-of-state insurance companies and their representatives of the regulation's effect, thus giving them advantages over local competitors, but by so doing would tend to break down the system of regulation in its purely local operation." (p. 449, U. S.)

A similar view is stated in *Milk Control Bd. v. Eisenberg Farm Products*, 306 U. S. 346 (1939). In this case the Court, in affirming a Pennsylvania statute which resulted in the regulation, among other things, of the business of buying milk solely for transportation in interstate commerce, said:

> "If dealers conducting receiving stations in various localities in Pennsylvania were free to ignore the requirements of the statute on the ground that all or a part of the milk they purchase is destined to another state the uniform operation of the statute locally would be crippled and might be impracticable. There is, therefore, a comparatively large field remotely affect-

> in and wholly unrelated to interstate commerce within which the statute operates. These considerations we think justify the conclusion that the effect of the law on interstate commerce is incidental and not forbidden by the Constitution, in the absence of regulation by Congress." (p. 353, U. S.)

As in the *Eisenberg case* there is in the instant case, a "comparatively large field remotely affecting and wholly unrelated to interstate commerce" within which the Indiana statutes operate. These statutes set up a general plan of local regulation and are not directed primarily at interstate utility operations. Nevertheless, the general plan of local regulation would be, as heretofore pointed out, seriously crippled if held to be inapplicable to industrial sales by interstate pipe line companies. Under such circumstances the local interest is plainly predominant and the national interest is negligible or non-existent. When this is the case, the courts have not hesitated to validate the exercise of state authority. This is simply an application of the principle that:

> ". . . the reconciliation of the power thus granted (to the Federal government under the Commerce Clause) with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved . . ." (*Parker* v. *Brown*, 317 U. S. 341, 362 (1943)).

(e) The regulation necessary to protect the local interest cannot be administered from the federal level.

These public interests which would be adversely affected if states are to be denied the right to regulate direct industrial sales, are essentially matters of local concern to the people of Indiana, particularly those people living in the service areas in question. It is vital to them, and not to the people of other states or the nation as a whole, that gas be supplied at reasonable and non-discriminatory rates

and that the distribution systems serving local areas be not undetermined by the snatching of industrial customers in the manner proposed by Panhandle.

Not only are these matters of local concern, but they are matters which, by their very nature, admit of "diversity of treatment according to the special requirements of local conditions" (to use the language of Mr. Justice Hughes, in the *Minnesota Rate cases* quoted above), and in fact are matters not susceptible of uniform national regulation at the federal level.

The problems arising from the sale of natural gas to consumers, domestic, commercial and industrial, vary widely from state to state, and from company to company. What regulatory laws are necessary, and what commission policies are necessary in administering those laws, is obviously dependent upon the local conditions in each state.

It is not necessary to elaborate upon the practical difficulties which would be involved if Congress attempted to deal with these local and varying problems on a national basis. The best evidence of the existence of these practical difficulties is that Congress, having before it the problem of regulating the natural gas industry, deliberately chose to exempt industrial sales from federal regulation.

On this phase of the case, the opinion of the Court below is especially pertinent. The Court said:

> "We seem to have all the prerequisites to state intervention. Congress has not elected to exercise its power under the commerce clause. Uniformity in control of direct sales from interstate pipe lines to large industrial consumers does not seem to be necessary. There is nothing in the record to indicate that it is. Conditions will differ from area to area and the varying needs will be met by varying procedures. Furthermore, the fact that there has been no uniformity, so far as the record shows, up to this time, and the additional fact that Congress rather deliberately left regulation of such sales out of its regulatory scheme are also indicative that uniformity is not necessary, or at least that Congress did not believe it to be necessary.

> . . . It would also seem that Congress did not believe the national interest in the regulation of such business outweighed local needs, and the logic of the situation seems to support such position." (R. 207, 71 N. E. (2d) 117, 125)

Congress, in following this course, was merely conforming to its long standing policy of leaving consumer utility sales and service to state regulation even where such sales actually constitute interstate commerce.

The federal government can and does, under the Natural Gas Act, set the wholesale price at which interstate pipe line companies sell natural gas to local distributing companies. In so doing the Federal Power Commission is principally concerned with the financial condition and operating problems of the pipe line company, and it must also take into account, in a general way, the over-all requirements of local distributing companies and industries served by the pipe line company, and the right of the public that such distributing companies shall obtain their supply of gas at reasonable rates.

But the federal agency, in setting these interstate wholesale rates, is not required to make a detailed study of the rate structure applicable to consumers of all classes in the many cities and towns receiving interstate gas, with the purpose of requiring a fair distribution of total cost,—but operating cost and cost of return on capital,—as between such classes of service. It is not required to analyze the financial position of local distributing companies. It is not required to weigh the relative needs of the several classes of consumers in each such city or town. It is not required to determine the effect of competing fuels upon the industrial-consumer rate. It is not required to consider the relationship between the pipe line company and the local distributing company. Yet all of these factors are involved in the regulation of rates and service to industrial consumers located in these cities and towns.

Hence it is obviously absurd to conclude that, because it has been found practicable to regulate interstate wholesale rates and service from the federal level, this would also be true with respect to the industrial consumers located within local service areas. The problems involved in regulating the sale of natural gas to such industrial consumers are inextricably interwoven with the problems involved in regulating all other consumer sales in the same service area. The regulatory agency which regulates consumer sales in general must, therefore, be the agency to regulate sales to industrial consumers. There is no practicable way of dividing this function of government between the state and federal levels.

From what is said above it is reasonable to conclude: (1) that regulation of direct industrial sales is necessary to assure adequacy of supply and reasonableness of price of natural gas sold to the consuming public; (2) that these are primarily matters of local rather than national concern; and (3) that such regulation admits of, and in fact requires, diversity of treatment as between the states, and would be wholly impracticable at the federal level.

(f) There is no national interest in having direct industrial sales go unregulated.

But some arguments have been advanced to the effect that, despite this local interest and inability to safeguard it through federal regulation, there is a predominant national interest in having direct industrial sales go wholly unregulated.

The principal argument of this kind is based upon the very obvious fact that it is in the national interest that pipe line companies be not regulated by any state or locality in such a way as to interfere with their operations in the other states in which they serve. It is said that, if each state may regulate direct industrial sales consummated within its borders, a pipe line company serving several states may be confronted with a variety and conflict

of regulation that will create an impossible situation. Specifically it is suggested that one state may require the pipe line company to deliver to industrial customers in that state an unfairly large proportion of the company's gas supply, and that one state may fix rates on industrial sales which will unduly burden the pipe line company in its operations in other states, and rates which may produce gross inequities as between industrial consumers situated in different states.

The most obvious answer to all of these suggestions is that they are—just suggestions. They are not based upon facts of any kind or character. State regulation of direct industrial sales has only recently become important and hence has only recently received active attention by the states. Up to this time there is no vestige of evidence that any of the dire results predicted by the opponents of state regulation, will ever materialize. If they do materialize the courts will be free to reexamine the question in the light of the proven facts, and to determine whether constitutional rights are being violated: and Congress may at any time meet any situation hurtful to the national interest by providing for federal regulation, or by expressly forbidding state regulation. In *Southern Pacific Company v. Arizona, supra,* the Supreme Court, in holding unconstitutional an Arizona train-limit law, did not base its conclusions upon what might possibly happen if that state regulation were permitted to stand, but upon a large accumulation of evidence as to actual experience and results with that state regulation.

The fact that state regulatory power may conceivably be exercised in such a manner as to be injurious to interstate commerce, or to the citizens of another state, is no argument against the existence of the power. When the same company serves the public in *domestic* and *commercial* service in localities located in different states it is unquestionable that each state has the power to regulate such services within its borders, including the rates therefor.

And it is manifest that by a misuse of that power in fixing rates, or by requiring an extension of services to areas not before served, and beyond the capacity of the company to serve (consistently with its service in other states) the same character of inequities would be created which are suggested as possible in the *industrial* field. Yet the possibility of such misuse of power has never been held to invalidate state regulation of domestic and commercial service by a company rendering such service in more than one state.

It is a serious thing for the courts to throw out, as unconsitutional, a state statute which admittedly serves a very important local need. It should only be done where actual experience shows this course to be essential to the national welfare. It should never be done, we earnestly urge, upon the basis of pure assumption and speculation.

It should be remembered, too, that the question here is not state regulation versus federal regulation. It is state regulation versus *no* regulation. It is therefore pertinent to inquire whether the danger of *one* state being discriminated against as to its gas supply or rates is greater under state regulation than it would be with no regulation. State officials have demonstrated in innumerable ways and over a long span of years, their disposition and ability to cooperate in solving problems involving multi-state utilities and carriers. What reason is there to believe that these public officials will have the national interest at heart to a less degree than the managers of the pipe line companies?

Moreover, if a state commission should attempt to set a rate or prescribe service requirements which would place an unfair and unreasonable burden upon the company's system and operations in other states, the company has a complete and adequate remedy under the 14th Amendment of the Constitution.

Had there been a national interest in assuring that direct industrial sales would go entirely unregulated by any agency, state or federal, Congress would have made this

clear when it passed the Natural Gas Act, by expressly forbidding state regulation. As a matter of fact, Congress understood that the states had authority to regulate such sales, in the absence of federal legislative action, as will be pointed out in a subsequent section of this brief. Yet Congress did nothing to preclude the states from exercising that authority when and as local interest required.

Finally, it is beyond comprehension how there could be a great national interest in freeing direct industrial sales of all regulations, while industrial sales of much greater importance and magnitude, made through the pipes of local distributing companies, have at all times been subject to state regulation. Only five per cent of all industrial sales, by volume, are made by interstate pipe line companies, according to an estimate of counsel for the Independent Natural Gas Association, as appears from a statement placed before the Committee at the hearing on H. R. 2185, later referred to at page 57 of this brief.

(g) The *Attleboro* and *Baldwin* cases distinguished.

In its opening brief herein, Panhandle relies principally upon two United States Supreme Court decisions, *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927), and *Baldwin* v. *Seelig*, 294 U. S. 511 (1935), to support its view that the states may not, for the purpose of protecting the local public interest, provide regulation, applicable to interstate commerce, of the character here in issue.

Referring first to the *Attleboro case*, it is plain that this case did not involve direct industrial sales, but rather, sales for resale, which class of sales had already, in the earlier case of *Missouri ex rel. Barrett* v. *Kansas Natural Gas Company*, 265 U. S. 298 (1927) been held to be essentially national in character. The United States Supreme Court has never held direct industrial sales to be essentially national in character—that is the very question in issue in this case.

To say that the *Attleboro case* is authority here is simply to beg the question by assuming that direct industrial sales are essentially national in character.

The *Attleboro case* involved the right of the Rhode Island Commission to increase the interstate wholesale rates which a Rhode Island utility, Narragansett Electric Lighting Company, charged a Massachusetts distributing company, Attleboro Steam & Electric Company, for delivery of electric energy at the state line for exportation from the state. The Rhode Island Commission asserted that regulation of the wholesale rate was necessary in order to protect the interest of local consumers in Rhode Island. The Court held against this contention, saying:

> "It is clear that the present case is controlled by the Kansas Natural Gas Company case. The order of the Rhode Island Commission is not, as in the Pennsylvania Gas Company case, a regulation of the rates charged to local consumers, having merely an incidental effect upon interstate commerce, but is a regulation of the rates charged by the Naragansett Company for the interstate service to the Attleboro Company, which places a direct burden upon interstate commerce . . ." (p. 89, U. S.)
>
> ". . . Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in character. The rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress." (p. 90, U. S.)

Thus the *Attleboro case* is authority only for the rule that *interstate sales for resale*, having already been held to be national in character, cannot be regulated by the states for any purpose. It made no ruling on state regulation of sales to industrial consumers and, in fact, pointed out that the *Attleboro* situation differed from that involved in *Pennsylvania Gas Company* v. *Public Service Commis-*

sion, 252 U. S. 23 (1920), wherein the constitutionality of state regulation of interstate sales to "local consumers" was upheld. It was because of the *Attleboro* decision that Congress, in the Federal Power Act pertaining to electric energy, provided for federal regulation of interstate sales for resale. Federal Power Act of 1935, 49 Stat. 847, c. 687, 16 U. S. C. 824, Section 201 (a)-(e). That Act did not provide for federal regulation of any sales to consumers, including sales to industrial consumers, for it was understood by Congress that the *Attleboro* decision did not disable the states from providing such regulation. This is made clear in *Jersey Central Power & Light Company* v. *Federal Power Commission,* 319 U. S. 61 (1943), where the Court, in referring to section 201 of the Federal Power Act, states (page 70):

> ": . . Subsections (a) and (b) show the intent to regulate such transactions as are beyond state power under the Attleboro Steam & Electric Co. Case, 273 U. S. 83, 71 L. ed. 549, 47 S. Ct. 294, *supra* . . ."

The same view is expressed in *Connecticut Light & Power Company* v. *Federal Power Commission,* 324 U. S. 515 (1945) at page 524.

In the *Baldwin case,* also relied upon by Panhandle, the court declared invalid a New York statute prohibiting the sale within the state, of milk brought from another state unless the minimum prices prescribed to be paid to New York producers had been paid to the out-of-state producer.

The facts of the *Baldwin case* bear no recognizable similarity with the facts of the instant case. The purpose of the New York statute was to promote the economic welfare of New York farmers by guarding them against competition with the cheaper prices of other states. To accomplish this the New York statute prohibited any sales of milk within New York, if the seller paid less than a certain wholesale price for the milk *in another state (Vermont in that case) where he acquired title to the milk.*

In the *instant* case there is no purpose to protect local residents, industries or distributing companies as against residents, industries or distributing companies located outside of Indiana. All of the gas used by the local distributing companies in question, and their customers, comes from out-of-state—all of it is brought into the state by Panhandle. State regulation here is only for the purpose of assuring fair treatment *as between the residents of Indiana* by gas utilities in their Indiana operations and of course there is no attempt to dictate what price Panhandle shall pay in some other state for the gas it brings in to Indiana. Should the Commission attempt any *unreasonable* regulation, violative of the 14th amendment or of any other provision of the Constitution, the company has a complete and adequate remedy by an appeal to the courts.

Where, as in the instant case, the effect of state regulation upon interstate commerce, even though direct, is only incidental to a general plan of local regulation, the courts sustain the regulation as a matter of local concern not requiring national uniformity. This point is fully discussed under (d) above. In the *Eisenberg case*, there referred to, the Court, in validating state regulation, distinguished in these words, the *Baldwin case* upon which Panhandle relies:

> "In Baldwin *v.* G. A. F. Seelig, . . ., this court condemned an enactment aimed solely at interstate commerce attempting to affect and regulate the price to be paid for milk in a sister state, and we indicated that the attempt amounted in effect to a tariff barrier set up against milk imported into the enacting state." (page 353, U. S.)

Unlike the circumstances involved in the *Baldwin case*, the Indiana regulatory statutes here in question are not "aimed solely at interstate commerce attempting to affect and regulate the prices to be paid for milk (or gas) in a sister state. . . ." The prime objective of the Indiana

statute is to regulate transactions occurring wholly within the State of Indiana and affecting only the people of Indiana. The application of those statutes to the industrial sales in question is only incidental to that prime objective, but essential to the attainment of it.

(h) Summary on question of local versus national interest.

From what has been said above we respectfully submit that direct industrial sales admit of "diversity of treatment according to the special requirements of local conditions" (*Minnesota Rate Cases*); that such sales "are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress" (*Barnwell case*); that the impact of state regulation of such sales "on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight" (*Southern Pacific case*); and that, accordingly, "the state may act within their respective jurisdiction until Congress sees fit to act." (*Minnesota Rate Cases*).

The case falls squarely within the rule recently announced by the Supreme Court in *Parker* v. *Brown*, *supra*. In validating a state program adopted for the 1940 raisin crop under the California Agricultural Prorate Act of 1938, the Court there said:

> "Such regulations by the states are to be sustained, not because they are 'indirect' rather than 'direct' (citing cases), not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health, and well-being of local communities, and which, because of its local character and the practical difficulties in-

volved, may never be adequately dealt with by Congress . . ." (page 362)

Substantially the same principle was announced in *Port Richmond etc. Ferry Company* v. *Board of Chosen Freeholders*, 234 U. S. 317 (1914), sustaining state regulation of rates for ferry boat service across the Hudson River. The Court there said:

> ". . . It is argued that the mere fact that interstate transportation is involved is sufficient to defeat the local regulation of rates, because, it is said, that it amounts to a regulation of interstate commerce. But this would not be deemed a sufficient ground for invalidating the local action without considering the nature of the regulation and the special subject to which it relates. The fundamental test, to which we have referred, must be applied; and the question is whether, with regard to rates, there is any inherent necessity for a single regulatory power over these numerous ferries across boundary streams; whether, in view of the character of the subject and the variety of regulation required, it is one which demands the exclusion of local authority . . . The practical advantages of having the matter dealt with by the states are obvious . . ." (page 331)

It is no answer to say that the *Parker case* involved raisins and the *Port Richmond case* involved ferry boats, and therefore the principle therein announced cannot be applied to the instant case, which involves pipe line companies. The fact is that the *Parker* and *Port Richmond cases*, as well as the other decisions referred to above, supply a test by which the facts and circumstances of any case can be measured.

The facts and circumstances relative to industrial consumer sales of natural gas as set out above, show beyond doubt that such sales may, to apply the test of *Parker* v. *Brown*, "appropriately be regulated in the interest of the safety, health and well-being" of the people of Indiana, and that, because of their "local character and the prac-

tical difficulties involved," such sales "may never be adequately dealt with by Congress." Likewise, to apply the test of the *Port Richmond Ferry Company case*, the facts and circumstances of this case plainly demonstrate that there is no "inherent necessity for a single regulatory power" with authority to regulate industrial consumer rates, and that "the practical advantages of having the matter dealt with by the states are obvious."

The foregoing consideration of the court decisions and their application to the relevant facts of this case, clearly establishes that, as a general proposition and without reference to the natural gas and electric utility decisions, the industrial sales in question are matters of local concern fully subject to state regulation. But this Court, in a natural gas case presently to be noticed, has furnished a conclusive authority in support of state power to regulate such sales.

B. The Sale of the Interstate Gas in Question, Being a Sale to an Ultimate Consumer, is Subject to State Regulation Under Authority of the Pennsylvania Gas Company Case.

Pennsylvania Gas Company v. *Public Service Commission, supra*, involved the right of the New York Commission to regulate the sale of gas to ultimate domestic and factory consumers in cities and towns of New York, by a company which had transported the gas by pipe lines from the source of supply in the State of Pennsylvania. There was no interruption in the flow of gas—it was transported without intervention of any sort between the seller and the buyer. It was this circumstance which led the Court to distinguish the case of *Public Utilities Commission* v. *Landon*, 249 U. S. 236 (1919), and to hold that here, the sales to ultimate consumers constituted interstate commerce. This holding in the *Pennsylvania Gas Company case* was later disapproved in *East Ohio Gas Company* v. *Tax Commission*, 283 U. S. 465 (1931).

But the *Pennsylvania Gas Company case* announced another ruling which has never been disapproved; which has been consistently followed ever since; and which has a very direct bearing upon the instant case. After quoting at length from the *Minnesota Rate Cases, supra*, to the effect that the states may pass laws indirectly affecting interstate commerce, when needed to protect or regulate matters of local concern, the Court said:

> "The thing which the state Commission has undertaken to regulate, while part of an interstate transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown, in the state of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the state, nevertheless, the service rendered is essentially local, and the sale of gas is by the company to local consumers, who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city.
>
> "This local service is not of that character which requires general and uniform regulation of rates by Congressional action, and which has already been held beyond the power of the States, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest, and has not been attempted under the superior authority of Congress." (page 30)

Here, then, is a holding that consumer sales of natural gas may be regulated by a state, even though they constitute interstate commerce. See also, *Lone Star Gas Company* v. *Texas*, 304 U. S. 224, 237 (1938).

The consumer sales in question were made as a part of a general local distribution business and by means of pipe lines laid in city streets through which the gas was

transported at reduced pressure. These factors are relied upon by Panhandle as distinguishing the *Pennsylvania Gas Company case* from the instant one involving direct industrial sales. But the general view held by the courts, as will be later developed, appears to be that the controlling factor in the *Pennsylvania Gas Company case*, was not the presence of a city-wide distribution system, or the use of city streets, but, rather, the circumstances that the sales being regulated by the state were sales to *ultimate consumers*.

This general view is also supported by a consideration of the basic constitutional question. That question is whether the subject matter of regulation and the proposed regulation itself, are matters of local concern, or whether they are matters demanding uniform national treatment. In considering that question, of what relevancy is the fact that the gas is transported under reduced pressure? No one has shown that there is a national interest when gas is piped at one pressure but not at another, and conversely, it has not been shown that the existence of a dominant local interest in fixing reasonable consumer rates has any relationship to the pressure in the gas mains.

Likewise, how can it be said that the local interest in consumer rates is directly related to whether or not the pipes are laid in city streets, or whether the seller has a franchise for its pipes, or whether the seller is distributing to an entire city of consumers or only a few? Conversely, can any logical relationship be established between the dominant national interest and the use or non-use of city streets, the existence or non-existence of franchises, the service to a whole city or to only a few consumers?

None of the possible adverse effects of permitting Panhandle to render unregulated service to Anchor-Hocking will be diminished in the least merely because Panhandle will render such service from a direct connection with its pipe line rather than through a local distribution system. Certainly, then, the type of piping system which is utilized

can have no direct bearing upon the question of local interest. It follows from this that the incidental circumstances of the *Pennsylvania Gas Company case*, that service was rendered through a distribution system laid in city streets, is not the controlling circumstances which led the Court to find a dominant local interest and to validate state regulation.

It may be contended that, in the *East Ohio Gas Company case*, the Supreme Court rejected the ruling, in the *Pennsylvania Gas Company case*, that sales of interstate gas to ultimate consumers are subject to state regulation. A careful analysis of the *East Ohio Gas Company case* will expose the fallacy of such a view. The facts of that case show that the State of Ohio had taxed the revenues from local sales of gas made by a utility which supplied the gas to consumers directly from sources outside the state. The company denied the state's power to tax, asserting that the services were interstate in character, and that the revenues therefrom were hence beyond the reach of the taxing power of the state. The *Pennsylvania Gas Company case* was cited as conclusively establishing the interstate character of the commerce.

The Court was then first compelled to make a careful consideration as to whether such sales were in fact properly classifiable as interstate. Its conclusion was that after gas had been brought into a state, and its pressure had been reduced preparatory to sale for local consumption, such gas could not properly any longer be considered as in interstate commerce.

In reaching its conclusion that the local distribution constituted intrastate commerce, the Court, in the *East Ohio Gas Company case*, was forced to disapprove the contrary ruling on this point in the *Pennsylvania Gas Company case*. This it did by saying:

> "It does not appear that there were presented, in Pennsylvania Gas Co. *v.* Public Serv. Commission, to the state court or here the considerations on which it is held that interstate commerce ends and intrastate

> business begins when gas flowing through pipe lines from outside the state passes into local distribution systems for delivery to consumers in the municipalities served. But, however that may be, the opinion in that case must be disapproved to the extent that it is in conflict with our decision here." (page 472, U. S.)

It will be observed that the Court was careful to disapprove only that portion of the *Pennsylvania Gas Company* decision which held local distribution to be interstate commerce. It did not disapprove the ruling that consumer sales are matters of local concern which may be regulated by the states even if held to be interstate commerce. This is shown by the later citation of the *Pennsylvania Gas Company case* in support of that principle in *Illinois Natural Gas Company* v. *Central Illinois Public Service Company*, 314 U. S. 498, 505 (1942), and in the dissenting opinion of Mr. Justice Roberts in *Jersey Central Company* v. *Federal Power Commission, supra*, at page 80. The *Pennsylvania Gas Company case* was also cited, without any indication that the ruling in question had been superseded, in the separate opinion of Mr. Justice Jackson in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 651 (1944), and in the Court's opinion in the recent case of *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581 (1945).

In the *Illinois Gas Co. case*, cited above, the Supreme Court, 11 years after the *East Ohio* decision, acknowledged the continued authority of the *Pennsylvania Gas Co.* decision, when it said:

> ". . . Thus, in *Pennsylvania Gas Co.* v. *Public Serv. Commission* . . ., where natural gas was transported by pipe line from one state into another and there sold directly to ultimate local consumers, it was held that, although the sale was a part of interstate commerce, a state public service commission could regulate the rates for service to such consumers. While the Court recognized that this local regulation would to some extent affect interstate commerce in gas, it

> was thought that the control of rates was a matter so peculiarly of local concern that the regulation should be deemed within state power." (page 505)

In the *Jersey Central case*, cited above, Mr. Justice Roberts, discussing in his dissenting opinion, a point which was not contested in the principal opinion, cited the *Pennsylvania Gas Co. case* as authority for this statement:

> "There is no dispute concerning the exigency which moved Congress to adopt the statute (Federal Power Act). It had been settled that the transmission and sale of a commodity, such as electricity or gas, produced in one state, transported and furnished directly to consumers in another state, in interstate commerce, did not preclude regulation of the rates to the consumer by the state of delivery." (page 80)

It is worthy of note that in both of these recent references to the *Pennsylvania Gas Co. case*, no mention was made of the fact that the *Pennsylvania case* involved a local distribution system, or that the service to consumers was made by means of pipes laid in city streets. The emphasis was placed entirely upon the fact that the sales were made to *ultimate consumers* in the state of delivery. Thus, clearly, the Supreme Court now interprets the *Pennsylvania Gas Co.* doctrine as applying to sales to any ultimate consumer, including the type of industrial consumer involved in the instant case.

The recent Supreme Court references to the *Pennsylvania Gas Co. case* differ from some of the earlier opinions, where considerable emphasis was placed upon the fact that in the *Pennsylvania case* the local consumers were being served by means of a local distribution system with pipes laid in city streets. See *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co., supra*, page 309, U. S.; and *Public Utilities Com.* v. *Attleboro Steam & E. Co., supra*, at page 87.

Not all of the earlier cases took this view, however. In *United Fuel Gas Co.* v. *Railroad Commission*, 278 U. S.

300, 317 (1929), the *Pennsylvania Gas Co. case* was cited as authority for the proposition that sales to *ultimate consumers* are subject to state regulation, although interstate commerce may be involved. In any event, the recent pronouncements of the Supreme Court, as indicated above, put the emphasis entirely upon the circumstances of ultimate consumption and not upon the circumstance that a local distribution system may or may not be involved.

Further proof that the *Pennsylvania Gas Co. case* is still considered as authority, and that the state regulation there validated is not regarded as being confined to instances where local distribution systems and city franchises are involved, is to be found in the report of the House Committee on Interstate and Foreign Commerce (Report No. 709, 75th Congress, 1st Session, also quoted in *Illinois Natural Gas Co.* v. *Central Ill. Public Serv. Co., supra*, page 506) favorably reporting H. R. 6586, which became the Natural Gas Act. The Committee there said:

> "The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of Congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co.* v. *Public Service Commission* (1920) 252 U. S. 23) . . ." (page 1 of report)

The continuing authority of the *Pennsylvania Gas Co.* decision, when added to the repeated and consistent pronouncements of this Court dealing with a wide variety of other matters and types of regulation, clearly establishes that, under the relevant facts and circumstances of this case, the direct industrial sales, and state regulation thereof, are matters of local concern not requiring national uniformity of regulation and are hence subject to state regulation, even though assumed to be interstate commerce.

II.

Denial of State Power to Regulate Local Interstate Utility Service Would Upset a Long Standing and Well Considered Policy of Congress.

A. The Purpose of Congress in Exempting Industrial Sales From the Natural Gas Act was to Leave the States Free to Regulate Such Sales.

(1) Legislative History of Natural Gas Act.

The purpose of Congress in enacting the Natural Gas Act, was to occupy the field in which the Supreme Court had held that the states may not act. Congress was neither seeking to preserve nor to create a hiatus in regulation, but was striving in the opposite direction, to fill the gap in regulation as it then existed. All this is revealed by the legislative history of the Act, as well as by a reading of its language.

Comprehensive federal regulation of interstate natural gas pipe line companies was first proposed in Title III of H. R. 5423, 74th Congress, introduced on February 6, 1935. This bill later developed into the Public Utility Act of 1935, but Title III was dropped, due to criticism of specific provisions and the fact that the Federal Trade Commission had not completed its investigation and report of utilities, authorized by Senate Res. 83, 70th Congress. See Federal Utility Regulation, Annotated (1943) Public Utilities Reports, Inc., pages 627-629.

On March 6, 1936, H. R. 11662, 74th Congress, relating exclusively to the regulation of natural gas companies, was introduced. Hearings on this bill were held, in April, 1936, before a subcommittee of the House Committee on Interstate and Foreign Commerce. Mr. Andrew R. McDonald, then a member of the Wisconsin Public Service Commission, and President of this Association, appeared before the Committee and presented a resolution which had been adopted by the Association. The leading paragraphs of this resolution read as follows:

"*Resolved*, That this Association favors the enactment by Congress of legislation vesting jurisdiction in some one of the existing Federal regulatory commissions to regulate the service of supplying gas, whether artificial or natural, produced in one State and sold at wholesale to a distributing company in another State, including rates applicable to such service; and be it further

"*Resolved*, That Congress be asked to limit the jurisdiction granted strictly to gas transmitted and sold at wholesale for resale, and that such legislation be so drawn as in no way to limit or impair the power of the States to regulate intrastate and local service and the rates applicable thereto;" (Printed hearings, page 81).

Mr. John E. Benton, then General Solicitor of the Association, also testified for the Association at the hearing on H. R. 11662. He made the following observations which are particularly significant because they were apparently concurred in by the committee as shown by the revisions subsequently made in the bill, and the report filed by the committee:

". . . the United States Supreme Court has recognized that the distribution of gas locally to consumers, either for domestic or *industrial* use is a local business, and may be reached and controlled and regulated by local authorities, municipal and State, as provided by State law, so long as Congress withholds its hands from regulation . . ." (Printed hearings, page 85, emphasis supplied)

"It was evidently the purpose of the one who drew the act to reserve to the State authorities the right to regulate the consumer rate, even though the consumer was an industrial user who received his supply in a high-pressure main." (Printed hearings, page 95)

"What the State commissions ask Congress to do, is to regulate interstate intercompany transactions, but not to regulate the rate to any consumer, *whether he takes for industrial or domestic use;* to regulate the sale price of gas only when sold for resale." (Printed hearings, H. R. 11662, 74th Cong., House Committee

on Interstate and Foreign Commerce, page 95, emphasis supplied.)

Mr. Benton called attention to the fact that the proviso to section 1(b), as it was originally worded in H. R. 11662, exempted local distribution only if such distribution was made from low-pressure mains. (Printed House hearings, page 91) On behalf of the Association he presented a suggested amendment to correct this, and to make it plain that *any* sale to an ultimate consumer, for *either* domestic or industrial use, and whether from a high or low pressure main, would be exempt from federal regulation, and thus subject to state regulation. (Printed House hearings, page 95) Mr. Dozier A. De Vane, then Solicitor for the Federal Power Commission, told the Committee that the amendment would not weaken the bill, but would strengthen it. Mr. De Vane's exact words were:

> "... it is a little unusual for State Commissioners to come in as they have in connection with this bill, by the chairman of their association, and by their general counsel, and not only urge that the bill in its entirety be passed with no suggested amendment that would in any way weaken the bill, but suggest amendments that would strengthen the bill." (Printed House hearings, page 151).

The exact wording of this amendment was not accepted by the Committee, but the Committee made revisions in section 1(b) to accomplish the same purpose, as will later be pointed out.

The testimony of all witnesses who touched upon the point was that H. R. 11662 was not intended to take anything away from the states but was intended rather to complement state regulation—to overcome a hiatus in regulation. See the testimony, in the printed House hearings, of De Vane, pages 25 and 41; McDonald, pages 81 and 82; Benton, page 90; and Cole, page 148.

After completing its hearings on H. R. 11662, the Committee revised the bill and reintroduced it, on May 12,

1936, as H. R. 12680, 74th Congress. The following day the House Committee on Interstate and Foreign Commerce favorably reported H. R. 12680, Report No. 2651, 74th Congress, 2d Session. Section 1(b) of the new bill differed from the same section of H. R. 11662 in that it omitted all reference to high-pressure and low-pressure mains, and provided specifically for federal regulation of sales for resale *and for no other regulation of sales.* The exact wording of section 1(b), in H. R. 12680, is as follows:

> "(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale of such gas for resale to the public, and to natural-gas companies engaged in such transportation or sale, but shall not apply to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas: *Provided,* That nothing in this Act shall be construed to authorize the Commission to fix the rates or charges to the public for the sale of natural gas distributed locally or for the sale of natural gas for industrial use only."

It will be observed that the revision of this section by eliminating the reference to high-pressure and low-pressure mains, made the intent clear, as Mr. Benton had urged before the Committee, that no local distribution was to be subject to federal regulation, regardless of the manner or method of its delivery. In its report on H. R. 12680, the Committee said:

> "The bill takes no authority from State commissions and is so drawn as to be a complement, and in no sense an usurpation, of State regulatory authority . . ." (page 2)

H. R. 12680 was not acted upon by the 74th Congress, but it was reintroduced, on January 29, 1937, as H. R. 4008, 75th Congress. Hearings on the new bill were held before the House Committee in March, 1937, and again Mr. Benton presented the views of the Association. Since

the form of section 1(b) and the other provisions of the bill were now generally satisfactory to the Association, Mr. Benton's statement was brief and did not touch upon the question now under discussion. During the course of the hearing, however, another witness suggested an amendment to section 1(b) and Mr. Benton thereupon filed with the Committee a memorandum discussing the suggested amendment.

The amendment was proposed by Mr. W. A. Dougherty, representing several large pipe line companies. He chose to construe the proviso at the end of Section 1(b) as an exemption of sales to industrial consumers from all regulation, state as well as federal; and he proposed that sales for resale, when for the purpose of industrial use only, be also exempted from regulation under the Act (state regulation of sales for resale being considered already precluded under the Commerce Clause). Mr. Dougherty proposed to accomplish this exemption by adding the following words at the end of the proviso: "or for resale for industrial use only." (Printed House hearings on H. R. 4008, 75th Cong., page 124)

In Mr. Benton's answering memorandum, Mr. Dougherty's misunderstanding of the purpose of section 1(b) was pointed out and an alternative amendment was submitted to make it crystal clear that federal regulation of sales for resale extended to cases where the gas is to be used for industrial purposes only. Mr. Benton said:

> "In this connection I point out that the exemption of industrial gas, as I understand your bill, is not for the purpose of exempting industrial gas from all regulation, but for the purpose of avoiding any possible claim that because some industrial user may be taking a very large quantity of gas, service to him, on account of its wholesale character, should be considered subject to regulation by the Federal Commission.
>
> "Service to an industrial user is just as much a local service, and within State jurisdiction to regulate until Congress acts, as is a sale to a householder for domestic use. Until Congress occupies the field, a

sale for industrial use is accordingly subject to State regulation under the rule laid down in *Pennsylvania Gas Company* v. *New York Public Service Company*, above cited.

"Sales for industrial use ought not to be exempt from all regulation, for the result may very well be that unjustifiable discrimination will result, and there will be no commission to which complaint may be made. Sales for industrial uses plainly ought to be subject to regulation by the same Commission which regulates sales to other classes of consumers, so that just and reasonable rates, for the several classes of service, properly related to each other, may be established. Under the bill as drawn, all consumer sales are exempt from Federal regulation, and left to State regulation. The language of the suggested amendment just proposed leaves this purpose unaffected, and makes clear that the regulation of intercompany sales is designed for the protection of the consuming public, as a part of the complete regulation of the entire utility service." (Printed House hearings on H. R. 4008, 75th Cong., page 143.)

The principal suggestion contained in the amendment submitted by Mr. Benton in connection with the above statement was that the words "for resale to the public" be expanded to read "for resale for ultimate public consumption, for domestic, industrial, or any other use." These words were adopted by the Committee and appear in the Act today, with the addition only of the word "commercial" to still further strengthen the provision. It is impossible to believe that the Committee would accept Mr. Benton's amendment, word for word, without sharing his views, quoted above, upon which the amendment was based.

H. R. 4008 was never reported out, but was reintroduced, as H. R. 6586, 75th Congress, with section 1(b) changed, as indicated above, thus taking the exact form in which it appears in the Act today, which is as follows:

"(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for

resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

H. R. 6586 later became the Natural Gas Act. In its report favorably recommending H. R. 6586, (Report No. 709, 75th Congress, 1st Session) the House Committee said:

". . . If enacted, the present bill would for the first time provide for the regulation of natural-gas companies transporting and selling natural gas in interstate commerce. It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been *able to regulate sales to consumers even though such sales are in interstate commerce*, such sales being considered local in character, and in the absence of Congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U. S. 23). *There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction.* However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri* v. *Kansas Gas Co.* (1924), 265 U. S. 298, and *Public Service Commission* v. *Attleboro Steam & Electric Co.* (1927), 273 U. S. 83). The basic purpose of the present legislation is to occupy *this field* in which the Supreme Court has held that the States may not act." (House Report No. 709, 75th Cong., 1st Sess., page 1, emphasis supplied)

The Court below, after quoting the above Committee report, said:

> "This language of the report clearly indicates the intent of Congress. It clearly indicates that the only sales to be regulated under the provisions of the bill were sales to local distributing utilities for resale. Failure to include sales direct to large industrial consumers indicates the thought upon the part of Congress that uniformity is not required in such sales and that they are so local in nature as properly to be left to state regulation." (R. 207, 71 N. E., 2d) 117, 124)

When H. R. 6586 reached the floor of the House on July 1, 1937, Congressman Lea, floor manager for the bill, repeated the substance of this statement. (Congressional Record, Vol. 81, Part 6, page 6721) Congressman Wolverton, also a member of the Committee which reported the bill, made substantially the same statement (page 6723).

The Senate Committee on Interstate Commerce held no hearings on H. R. 6586 after it had passed the House, but reported it favorably on August 9, 1937. The report (Report No. 1162, 75th Congress, 1st Session), merely quotes verbatim, the House Committee report on the same bill. Senator Wheeler, Chairman of the Senate Committee, discussed the bill when it reached the Senate floor on August 19. Pertinent to the question under consideration, Senator Wheeler said:

> Wheeler. "Yes, it (the bill) is limited to transportation in interstate commerce, and it affects only those who sell gas wholesale . . . and let me say to the Senator that, as a matter of fact, the bill does not interfere with State regulation in any way, shape, or form." (Congressional Record, Vol. 81, Part 8, page 9312)
>
> Wheeler. "This bill, of course, could not affect the price charged by the People's Gas Co. for gas produced in the State of Illinois, but when gas is brought into a State and sold at wholesale, the Federal authorities may simply go to the extent of saying, 'a reasonable price for this gas which is shipped at wholesale

> is so much'—just as they fix rates for railroads. This is a very minor part of the regulation, *and it touches only the part of the gas business which is now regulated by anybody under any circumstances.*" (page 9315, emphasis supplied)

The bill did not pass the Senate in 1937 but went over until the following summer, when it was passed on June 7, 1938, without further debate and after the adoption of two minor amendments relating to other matters. (Congressional Record, Vol. 83, page 8347) The bill was approved by the President on June 21, 1938, and became the Natural Gas Act.

In spite of the overwhelming evidence to the contrary, as outlined above, Panhandle contends that the legislative history of the Natural Gas Act shows that Congress exempted direct industrial sales, not because they were subject to state regulation, but because such sales were adequately controlled by the competition of other fuels. In support of this statement, Panhandle, in its brief, quotes one excerpt from the hearings on H. R. 11662—taken from a written memorandum submitted to the Committee by Mr. Dozier A. De Vane. This excerpt reads as follows:

> "The bill makes no attempt to regulate the production or gathering facilities of a natural-gas company . . . Likewise natural gas in the process of transportation in high-pressure mains in interstate commerce for industrial use is excluded upon the basis that such sale is made under highly competitive conditions and is not imbued with a public interest . . ." (Printed House hearings, page 17)

Mr. De Vane's remark is the only suggestion in all the Congressional hearings on either H. R. 11662 or H. R. 4008, that the exemption of main line industrial sales was based upon competitive factors rather than the fact that such sales were subject to state commission regulation. There was data presented respecting the various uses of natural gas (H. R. 11662 hearings, pages 73, 77); and testi-

mony to the effect that *all* natural gas sales by pipe line companies, including sales for resale, were adequately regulated by competition (H. R. 11662 hearings, pages 102, 104, 114, 152); and testimony that industrial sales—without distinction between main line sales and industrial sales by local distributing companies—were adequately regulated by competition (H. R. 11662 hearings, pages 78, 108).

But nowhere, except in Mr. De Vane's memorandum quoted above, is a distinction drawn between the effect of competition upon direct industrial sales, and other industrial sales or sales of gas for other purposes. Nor could any such distinction have been drawn, for it is perfectly obvious that competition with other fuels is no more an adequate substitute for regulation in the case of direct industrial consumer sales made by a pipe line company, than in the case of industrial consumer sales made by distributing companies and admitted to be subject to state regulation.

Mr. Devane's remark, made early in the hearing on H. R. 11662, unquestionably gave the wrong justification for the limitation of regulation under the Act to sales for resale, leaving direct sales of industrial gas outside Commission jurisdiction; and Mr. Daugherty sought to adopt his expression as indicative of a Congressional understanding that industrial sales were sufficiently regulated by competition, and did not call for public regulation. But, in fact, the reason for confining regulation under the Act to sales for resale was *the determined purpose of Congress to leave all consumer sales to state regulation*,—not that Congress considered that industrial sales should be free from regulation. And Congress made this clear, as we have seen, by adopting the explicit language proposed by Mr. Benton, in the reframing of Section 1(b) to subject *sales for resale* of industrial gas to regulation under the Act to the same extent as all other sales.

In view of the affirmative statements of other witnesses; the lack of any testimony supporting Mr. De Vane's state-

ment; the Committee's acceptance of an amendment designed to negative the view suggested by Mr. De Vane; the statements contained in the committee reports and made by the floor managers during House and Senate debates on the bill, all as set out above—Mr. De Vane's solitary statement, quoted above, cannot be regarded as indicative of an intent on the part of Congress that industrial consumer sales should be unregulated. The true purpose of this legislation, to close the gap in regulation rather than enlarge or perpetuate it, was stated by Mr. De Vane, during the hearings on H. R. 11662, when he told the Committee:

> "The real question we are dealing with here is this: There is a complete hiatus in the regulation of rates charged by these pipe line companies to local distributors of gas throughout the United States, and we are trying to augment State regulation by conferring authority upon a Federal agency to fix those rates." (page 41)

(2) Judicial Discussion of Legislative History.

Panhandle points, in its brief filed below, to language in recent Supreme Court decisions, wherein main line industrial sales are referred to as "unregulated business." *Colorado Interstate Gas Co.* v. *Federal Power Commission, supra,* and *Colorado-Wyoming Gas Co.* v. *Federal Power Commission,* 324 U. S. 626 (1945). The Court was referring to federal regulation, for that was the only matter before the Court, and its statement that such business was unregulated is a mere restatement of section 1(b) of the Act. But even if the Court was referring to all regulation, including state regulation, that would be without significance. The fact that direct industrial sales were not actually being regulated by the state would have no bearing upon the constitutional power of the state to provide such regulation—the only question now under discussion.

Panhandle also points to a tiny excerpt from the opinion of *Panhandle Eastern Pipe Line Company* v. *Federal*

Power Commission, 324 U. S. 635 (1945), reading as follows:

> "The direct sales are made to nineteen industrial consumers on an interruptible basis and at prices fixed in competition with other fuels."

Here again, the fact that the state was not at the time exercising its constitutional power by prescribing prices for these industrial sales has no possible bearing upon the existence of such constitutional power. And it was fair to say, as did the Court, that where no regulation prescribing prices was in effect, the prices were being fixed by competition. This is not to say, and the Court did not say, that Congress intended to exempt such sales from state regulation because of the competitive factor.

The judicial interpretation which this Court places upon the Natural Gas Act is not reflected by such infinitesimal fragments of opinions, not related to any consideration of Congressional intent, but rather by those comprehensive statements of the Court which have dealt with the broad purposes of Congress in enacting the legislation. In *Public Utilities Commission* v. *United Fuel Gas Company*, 317 U. S. 456 (1942), the Court said:

> "It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere. See H. Rep. No. 2651, 74th Cong., 2d Sess., pp. 1-3; H. Rep. No. 709, 75th Cong., 1st Sess., pp. 1-4; Sen. Rep. No. 1162, 75th Cong., 1st Sess." (page 4667 U. S.)

As aptly pointed out in the opinion of the Court below:

> "Inferentially this means that those transactions over which jurisdiction was not given to the Federal Power Commission may be considered as local matters and left to state regulatory bodies. And again we remember that among transactions not included in the Act are direct sales to large industrial consumers." (R. 206, 71 N. E. (2d) 117, 124)

In *Federal Power Commission* v. *Hope Natural Gas Company, supra*, this Court expressed a similar view, saying:

> "We pointed out in *Illinois Natural Gas Co.* v. *Central Illinois Pub. Serv. Co.*, 314 U. S. 498, 506, 86 L. ed. 371, 376, 62 S. Ct. 384, that the purpose of the Natural Gas Act was to provide, 'through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation.' As stated in the House Report the 'basic purpose' of this legislation was 'to occupy' the field in which such cases as *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, 265 U. S. 298, 68 L. ed. 1027, 44 S. Ct. 544, and *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, 71 L. ed. 549, 47 S. Ct. 294, had held the State might not act. H. Rep. No. 709, 75th Cong., 1st Sess., p. 2. In accompanying that purpose the bill was designed to take 'no authority from State commissions' and was 'so drawn as to complement and in no manner usurp State regulatory authority.' Id. p. 2. And the Federal Power Commission was given no authority over the 'production or gathering of natural gas.' Sec. 1(b)" (page 349, U. S.)

(3) Panhandle's Reference to Report No. 800, 80th Congress.

In Panhandle's opening brief herein, great emphasis is placed upon a report of the House Committee on Interstate and Foreign Commerce, issued on July 7, 1947 (Report No. 800, 80th Congress, 1st Session) favorably re-

porting the so-called Rizley bill, H. R. 4051, amending the Natural Gas Act. Panhandle's brief refers to this report in no less than six places (pages 21, 22, 51-53, 56-57, 61-63, 65). The purpose of Panhandle in referring to this recent House Committee report is apparently two-fold: (1) To support Panhandle's view that Congress, in enacting the Natural Gas Act, intended to leave direct industrial sales of interstate gas free of all regulation (see pages 51, 61, 62 and 63 of Panhandle's brief); (2) to support Panhandle's view that the regulation of such industrial sales is a matter of national rather than local concern (see pages 21, 22, 51 and 53 of Panhandle's brief).

We believe that this Court will perceive at once that reference to this July, 1947 Committee Report for the purpose of determining the intention of Congress in enacting the Natural Gas Act, is wholly inappropriate. Nothing anybody (even a Congressional Committee) can say *after* an act has passed through Congress and become law can be legislative history, which may legitimately be given consideration as tending to show the intent of Congress when it passed the act.

The Natural Gas Act was enacted by the 75th Congress and became law on June 21, 1938. The Committee Reports and Congressional debates in connection with the consideration of H. R. 6586, which became the Natural Gas Act, constitute authentic legislative history to which the courts may freely advert in construing the Congressional intent embodied in the Act. This is likewise true of other bills, introduced in the 75th and preceding Congresses, which are links in the progression of this legislation up to its enactment in 1938.

It is obvious, however, that no legislative activity since enactment of the Natural Gas Act in 1938 could constitute authentic evidence of the intent of Congress in passing that Act. This is true whether such later activity consists of the introduction of bills, the reports of committees, or debates in Congress. The most that such activity could reveal is the opinion of present members of Congress as

to the intent of a previous Congress. Needless to say, opinion evidence from any source is inadmissible on a question of statutory construction.

Even if such evidence were admissible it would be entitled to little weight under the circumstances of this case. The Committee Report was prepared in July, 1947, more than nine years subsequent to enactment of the Natural Gas Act. Of the 27 Congressmen who were members of the House Committee on Interstate and Foreign Commerce in May, 1938, only 6 are now on the Committee. Those six are: Charles A. Wolverton, Clarence F. Lea, Robert Crosser, Alfred L. Bulwinkle, Virgil Chapman and George G. Sadowski. None of these six hold-over members took a prominent part in the 1947 hearings or in the preparation of the Committee Report. Of these six, only Congressman Wolverton voted, during the House debate on July 11, 1947, against recommital of the bill to the House Committee. Congressmen Crosser and Sadowski voted to recommit and the other three hold-overs did not vote. (Congressional Record, July 11, 1947, page 8925)

The Report in question was submitted by Congressman Carson and during the House debates on H. R. 4051 it was said that the Report was prepared under his direction. (Congressional Record, July 11, 1947, page 8909) Mr. Carson first entered Congress in January, 1943, and so has no personal knowledge of the intent of Congress in enacting the Natural Gas Act five years prior thereto. The author of the bill, Congressman Rizley of Oklahoma, first entered Congress in January, 1941, and is not, and never has been, a member of the House Committee on Interstate and Foreign Commerce.

Under the circumstances, the Committee Report in question is entitled to as little weight, as an authoritative guide to the construction of the Natural Gas Act, as this Court recently accorded to 1943 Congressional debates in construing the Norris-LaGuardia Act, enacted in 1932. In *United States* v. *United Mine Workers of America*, 67 S.

Ct. 677, it was urged that the Court should give weight to opinions as to the meaning of the Norris-LaGuardia Act, expressed by several Senators on the floor of the Senate in 1943, during debates on the War Labor Disputes Act. Rejecting evidence of this character, the Court said:

> "We have considered these opinions, but cannot accept them as authoritative guides to the construction of the Norris-LaGuardia Act. They were expressed by Senators, some of whom were not members of the Senate in 1932, and none of whom was on the Senate Judiciary Committee which reported the bill. They were expressed eleven years after the Act was passed and cannot be accorded even the same weight as if made by the same individuals in the course of the Norris-LaGuardia debates. Moreover, these opinions were given by individuals striving to write legislation from the floor of the Senate and working without the benefit of hearings and committee reports on the issues crucial to us here. We fail to see how the remarks of these Senators in 1943 can serve to change the legislative intent of Congress expressed in 1932, and we accordingly adhere to our conclusion. . . ." (page 690)

As previously indicated, the Congressional Committees which reported the bills which became the Natural Gas Act, made the explicit statement that the states have been able to regulate sales to consumers "even though such sales are in interstate commerce" and that "There is no intention of enacting the present legislation to disturb the States in their exercise of such jurisdiction." (Report No. 709, 75th Cong., 1st Sess.) It is clear that the Court would not give weight to utterances on the floor of Congress conflicting with that Committee statement, even if such utterances were made during the debates on the bill. *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 125. Why, then, should the Court give greater weight to a conflicting Report, issued eight years later, by a Committee comprised almost wholly of new-comers and prepared by one who was not even in Congress in 1938?

But what utterly destroys the value of this 1947 Committee Report for any purpose helpful to Panhandle, is the fact that the bill which was favorably reported, H. R. 4051, did not become law. This bill passed the House on July 11, 1947, and, on July 17, was considered by the Senate Committee on Interstate and Foreign Commerce. At that time a motion by a member of the Committee to report favorably H. R. 4051, was defeated on a vote of 5 to 6. The bill is still pending before the Senate Committee and a subcommittee has been designated to hold further hearings. When the bill itself has been rejected, how can Panhandle possibly gain comfort from language in a Committee Report favorably reporting the bill?

This last consideration is also a complete answer to any contention that may be made that the language of the report evidences the view of Congress that direct industrial sales should be free and clear of state regulation. The report does contain language to that effect, as Panhandle quotes and requotes several times in its brief. But the bill favorably reported failed to become law and was, in fact, expressly rejected by the Senate Committee.

Under the circumstances the language of the Committee Report can be taken only to express the views of members of the House Committee or, more properly, of the limited number of members of that Committee who actively participated in the preparation of the report. Cast in this light, the views expressed in the Committee Report become no more than an expression of views of individuals who happen to be members of Congress and of the House Committee. Opinion evidence of this character, even if admissible, and even if it had been properly admitted in evidence—both of which we deny—would be entitled to scant weight in considering the constitutional question here in question. That question is to be determined, not by board generalizations, but by reference to the facts of this particular case, as developed in the record, and the law, as esablished in the court decisions.

With respect to the merits of the views set forth in this Committee Report, the points therein mentioned relative to the undesirability of state regulation present no new consideration not already advanced by Panhandle. These points have been fully discussed in earlier sections of this brief and need not be repeated here.

(4) Panhandle's Reference to an Amendment Presented for the Association at the Hearing on the Rizley Bill, H. R. 2185.

At page 56 of its opening brief Panhandle makes a quotation from a statement by the Advisory Counsel of the National Association of Railroad and Utilities Commissioners at the hearing on the Rizley bill, H. R. 2185, and on page 51 of said brief makes a quotation from the Committee Report, which has just been discussed in this brief. The quotations seem designed to create the impression that the primary purpose of presenting the amendment, referred to in the Committee Report, on behalf of the Association was to procure legislation subjecting direct sales in interstate commerce to state regulation. It may be well to point out that the amendment had a different and much broader purpose, and was designed to express the assent of Congress to state regulation of every gas utility operation removed from, or left outside, Federal Power Commission jurisdiction by the Act, *as proposed to be amended by the Rizley bill.*

That bill was an industry-backed bill to cut down Federal Power Commission jurisdiction over the natural gas industry. It was certain that if the bill should pass, as introduced, with no declaration of Congressional purpose, the interstate pipe lines would claim freedom from all regulation, as to operations excluded from the jurisdiction of the Commission under the Act, as amended. The amendment was designed to insure continued regulation of all gas utility operations by an expression of Congressional intent that every such operation not subject to regulation

under the amended Act should be left subject to regulation by state authority. This purpose, and the reason for it, will be clear from the language of the amendment, and from a somewhat more ample quotation from the Association statement respecting it than is to be found in the Panhandle brief. These follow:

> "Amend section 1 of said bill by adding thereto the following subsections:
>
> '(d). The Congress hereby declares that the regulation by the several States of the business of production and gathering of natural gas and of the transportation and sale thereof, except so far as by this act made subject to regulation by the Commission, is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to such regulation by State authority.
>
> '(e) Except only so far as by this act made subject to the jurisdiction of the Commission, the business of production and gathering of natural gas, and transporting and selling the same, and every part of such business, is declared to be local in character, and shall continue to be subject to regulation under the laws of the several States, and such regulation shall not be held to be a burden on interstate or foreign commerce.'"

Discussing this proposed amendment, the Association statement said:

> "We ask for the addition of two paragraphs to section 1. * * * These paragraphs declare that it is in the public interest that the natural-gas business shall be regulated, and that, except to the extent that it is subject to regulation by the Federal Power Commission under this act, it is considered local, and shall be subject to regulation by State authority. * * *
>
> "This is in accordance with the original purpose of Congress when it first passed the Natural Gas Act. In the first paragraph of the first section of that act, the Congress found and declared that 'the business of transporting and selling natural gas for ultimate dis-

tribution to the public is affected with a public interest.' That finding was as broad as the natural gas business. It related to the whole business, both that which was national in character, and that which was local. The entire business was declared 'affected with a public interest.' Congress also found and declared 'that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary,' but expressly limited the scope of the regulation provided in the second paragraph of the first section. The act was made to apply to transportation and sale in interstate commerce for resale, but to no other transportation or sale, and local distribution of natural gas and production or gathering were expressly excluded from Federal Power Commission regulation.

"Congress thus, while declaring the public interest in the regulation of the entire business, undertook with explicitness to declare what interstate transactions should be subjected to regulation by the Federal government. The intent was to regulate only what it was then understood the States could not regulate, leaving all other matters subject to regulation by the States. This was the basic purpose of the Congress in enacting the Natural Gas Act, as was very plainly stated by this committee, in its report on the bill. * * *

". . . Notwithstanding the fact that Congress thus withheld Federal regulation from sales to consumers in recognition of the understood power of the States to regulate such sales, and with the express purpose that such jurisdiction on the part of the States should not be disturbed, some of the largest pipe line companies have refused to recognize State jurisdiction over sales to industrial consumers. Litigation is now pending in Indiana and Michigan contesting the right of the States to regulate such sales. . . . In Indiana, in a very able and comprehensive opinion, the Supreme Court has held that industrial sales, as well as sales to other classes of consumers, may be regulated by the State, regardless of whether the sales should be regarded as intrastate or interstate. . . .

". . . The great majority of sales of industrial gas are made by local distributing companies, and are unquestionably subject to State regulation.

"In a discussion of this bill, issued under date of March 17, 1947, by Mr. Disne, general counsel of the Independent Natural Gas Association, and by Mr. Brown, general counsel of the Independent Petroleum Association, it is said:

> "'Local distributors, which are regulated by State commissions, make approximately 95 percent of the sales to industries, the direct sales of the interstate lines being only 5 percent of this class of business.'

"To exempt industrial sales of interstate gas from State regulation would disorganize State regulation, and would open the local field to the unregulated raids of unlicensed interstate pipe-line companies, which would skim off the cream of the business of local companies, represented by sales to large industrial users, and would leave the general rate-paying public, who must support the local companies, to absorb and bear the resulting loss of revenue from that business.

"The Indiana case is now on appeal by a petition for certiorari in the United States Supreme Court. We entertain no doubt that the Indiana court will be sustained. *We are not seeking legislation; but if this bill shall pass, we ask that it be made clear that it creates no twilight zone. The experience of the States with respect to industrial sales illustrates the great desirability, in the public interest, of making such intent clear, beyond all question.* • • •

"*The natural gas companies now ask this committee to give its sanction to a bill which aims to narrow the jurisdiction of the Federal Power Commission. It is uncertain how far the limiting amendments will reach.* • • •

"*This much, however, is certain. Whatever interstate transactions of transportation and sale of natural gas this bill will operate to remove from the regulation of the Federal Power Commission ought not thereby to be placed outside the realm of regulation.* • • •

"The amendment proposed to section 1 has been drawn to make this intention clear. In drawing it, we have followed a path already marked out by Congress, and sanctioned by the judgment of the United States Supreme Court." (Printed Hearing, pages 642-644.)

B. The Natural Gas Act Accords with the Long-Standing Policy of Congress Respecting State Jurisdiction.

In the enactment of the Natural Gas Act, Congress was but following a settled policy of respecting the jurisdiction found to be exercised by the state commissions. In 1929 the state commissions, at the Annual Convention of the National Association of Railroad and Utilities Commissioners, adopted a resolution as follows:

> "*Resolved*, That, whereas under the principle established by the decision of the United States Supreme Court in *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, state authorities, in the absence of federal legislation, retain power to regulate local service of utilities which operate across state lines, including the rates for such service, this Association asks Congress not to interfere with the continued exercise of that power as to any class of public utilities by legislation vesting power to regulate such service and rates in any federal tribunal.". (Proceedings, 41st Annual Convention, Natl. Assn. of R. R. & Util. Comm'rs., page 369).

This resolution was presented to the Congress from time to time when bills providing for federal utility regulation were under consideration. Congress complied with the request contained in this resolution.

Section 221 of the Communications Act of 1934 explicitly provides that nothing in the Act shall be construed to give the Federal Commission jurisdiction with respect to wire telephone exchange service "even though a portion of such exchange service constitutes interstate or foreign commerce, in any case where such matters are subject to regulation by a state commission or by local governmental authority."

Section 201(a) of the Federal Power Act, approved August 26, 1935, limits the jurisdiction of the Federal Power Commission in such fashion that it does not extend to any sale of power to a consumer.

It thus appears that, in conformity with the general plan of our government, under which matters of local concern, which do not so affect the interest of the states generally as to require federal control, are left to be dealt with by the states; control over the sale of gas, of electric energy, and of exchange telephone service, has been claimed by the states and has been recognized and respected by the Congress.

C. A Denial of State Jurisdiction in this Case Would Constitute a Far-reaching Precedent Adverse to Effective Regulation of All Local Utility Services.

The distributing companies which are engaged in supplying gas to consumers in Indiana have made large investments to enable them to render that service. They are required to serve at prices which will yield to them only a reasonable return. The prices they must charge inevitably depend to a considerable extent upon the volume of business which they do. Hence if Panhandle may take away their largest customers, the cost of gas service to consumers generally will necessarily be increased, and the procurement of reasonable rates through regulation will be defeated.

Panhandle, however, asserts the right, under the Commerce Clause, to disregard all state laws, because it brings the gas which it sells in Indiana from another state. If that contention, as to the effect of the Commerce Clause, is valid, then state regulation of direct sales and services rendered across state lines is inhibited, not only as to gas, but as to electric energy and as to telephone exchange service, and as to water and every other character of local utility service so rendered.

It will thus come about that the care exercised by the Congress to avoid grants of power to federal agencies to regulate such local services, instead of operating as Congress designed, (making such intent clear by express language in the above mentioned report on the Natural Gas

act) to leave such regulation to the states, will operate to leave such services wholly beyond the reach of any regulation by any agency, unless and until Congress shall hereafter legislate. Meantime the business of established gas and electric utilities, operating in conformity with state laws, will be subjected to the unregulated raids of interstate pipe line and power companies, whenever such raids may appear profitable to their perpetrators. This will disorganize state regulation of public utilities and upset a well considered Congressional policy which has been followed in all acts providing for federal utility regulation.

It is plain that a decision preventing the regulation of the industrial sales here involved will produce immediate and greatly injurious results not only in Indiana but throughout the nation.

In a case which will thus affect a national situation, dealt with by Congress according to a consistent plan in a series of statutes extending back many years, it may be safely assumed that this Court will not render a decision denying state jurisdiction unless compelled thereto by some well recognized requirement of the Constitution. We respectfully urge that the decisions of this Court, cited herein, establish that there is no such requirement.

CONCLUSION.

The striking fact, developed by a study of all the Supreme Court decisions bearing on the subject, is that not once has the Supreme Court failed to sustain state regulation or taxation of sales to ultimate consumers of whatever kind or character. As Professor Thomas Reed Powell has said in his exhaustive survey of the cases (Harvard Law Review, Vol. LVIII, No. 7, 1945, page 1082):

> "... the Supreme Court has from the beginning allowed the state both to tax and to fix the price on the first sale or delivery of gas or electricity brought in from a sister state when and if this first sale is also

necessarily the last sale because consummated by consumption. . . ."

It is also true that the trend of recent Supreme Court decisions runs in favor of sustaining state authority. As this Court very recently said in *Prudential Insurance Co. v. Benjamin, supra:*

". . . the tendency also has run toward sustaining state regulatory and taxing measures formerly regarded as inconsonant with Congress' unexercised power over commerce. . . ." (page 420)

It is submitted that, under the relevant facts and circumstances of the instant case, tested in the light of the language of the Natural Gas Act, of its legislative history, and of the foregoing Court decisions, the order of the Indiana Commission here under review is fully sustainable as an order dealing with matters of local concern subject to state regulation, in the absence of contrary action by Congress.

Respectfully submitted,

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October 28, 1947.

p. 8.

SUPREME COURT OF THE UNITED STATES

No. 69.—October Term, 1947.

Panhandle Eastern Pipe Line Company, Appellant,
v.
The Public Service Commission of Indiana, et al.

Appeal from the Supreme Court of the State of Indiana.

[December 15, 1947.]

Mr. Justice Rutledge delivered the opinion of the Court.

Broadly the question is whether Indiana has power to regulate sales of natural gas made by an interstate pipe-line carrier direct to industrial consumers in Indiana. More narrowly we are asked to decide whether the commerce clause, Const. Art. I, § 8, by its own force forbids the appellee, Public Service Commission, to require appellant to file tariffs, rules and regulations, annual reports, etc., as steps in a comprehensive plan of regulation preliminary to possible exercise of jurisdiction over rates and service in such sales.[1]

Panhandle Eastern transports natural gas from Texas and Kansas fields into and across intervening states, including Indiana, to Ohio and Michigan. In Indiana it furnishes gas to local public utility distributing companies and municipalities. These in turn supply the needs of over 112,000 residential, commercial and industrial consumers.

Since 1942 appellant also has sold gas in large amounts direct to Anchor-Hocking Glass Corporation for indus-

[1] The Commission is authorized to take these steps by Indiana statutes creating the state's regulatory scheme for public utilities. Burns Ind. Stat. Ann. §§ 54–101 *et seq.*

trial consumption.[2] Shortly before beginning this service appellant had informed a number of its customers, local distributing companies in Indiana, that it intended to render service directly to large industrial consumers wherever possible.[3] Pursuant to that policy, since these proceedings began direct service has been extended to another big industrial user.[4]

In 1944 the Commission initiated hearings relative to direct service by Panhandle Eastern to Indiana consumers. It concluded that "the distribution in Indiana by Panhandle of natural gas direct to consumers is subject to regulation by this Commission under the laws of this state," notwithstanding any alleged contrary effect of the commerce clause upon appellant's direct sales to industrial users. Accordingly it issued its order of November 21, 1945, for the filing of tariffs, etc., as has been stated.

Early in 1946 Panhandle Eastern brought this suit in a state court to set aside and enjoin enforcement of the order. While the cause was pending the Commission issued a supplemental order declining appellant's offer to submit the specified tariffs, reports, etc., "as information only," and reasserting its full regulatory power as con-

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[2] Appellant's sales to Anchor-Hocking are far larger than sales made to several of the local distributing companies. Thus, in 1943 appellant sold 1,150,279 cubic feet to Anchor-Hocking and only 151,065 cubic feet to the local utility served from the same branch line. See note 8 *infra*.

[3] This was in 1941. In 1943 the chairman of appellant's board stated that "Panhandle was anxious to take over such business because it was unregulated transaction both as to the Federal Power Commission and the Public Service Commission of Indiana and that he intended to establish higher industrial rates based on a competitive fuel basis."

[4] Prior to the hearings before the Commission appellant had entered into arrangements to provide direct industrial service to an E. I. DuPont de Nemours & Company plant near Fortville, Indiana. That service was commenced subsequent to the hearings.

ferred by the Indiana statutes.[5] 63 P. U. R. (N. S.) 309.

The trial court vacated the orders and enjoined the Commission from enforcing them. It accepted appellant's view of the effect of the commerce clause on its operations. The Supreme Court of Indiana reversed that judgment and denied the relief appellant sought. — Ind. —, 71 N. E. 2d 117. It held first that the Commission's orders amounted to an unequivocal assertion of power to regulate rates and service on appellant's direct industrial sales and thus presented squarely the question of the Commission's jurisdiction over such sales as affected by the commerce clause. The court did not flatly hold that the sales are in interstate rather than intrastate commerce. But, taking them to be of the former kind, it held them nevertheless subject to the state's power of regulation under the doctrine of *Cooley* v. *Board of Wardens*, 12 How. 299. The court further held that appellant, in making these sales, is a public utility within the meaning and application of the state's regulatory statutes, Burns Ind. Stat. Ann. §§ 54–105 and Ind. Acts 1945, c. 53, p. 110. It is this decision we have to review pursuant to § 237 of the Judicial Code, 28 U. S. C. 344 (a).[6]

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[5] In the trial court the Commission had urged, as it still does, that its first order merely required the filing of information and that no action would lie to contest its power to fix rates or otherwise regulate the sales until that power was exercised. This resulted in bringing forth appellant's tender of compliance as "information only," conditioned upon the Commission's acceptance of the filing as such and without prejudice to appellant's right to contest the validity of any subsequent order. The supplemental order expressly stated that the filing, if any, would be deemed to be for the purpose of and available for use by the Commission in carrying out its further duties under the statute.

[6] Several of the local utility companies, which had been intervenors in the proceedings before the Commission, were permitted to intervene in the court test of the orders and are appellees here. The National Association of Railroad and Utilities Commissioners has filed a brief *amicus curiae* in support of the Commission's position.

The effect of the state statutes, whether permitting the filing of the tariffs, etc., as information unrelated to further regulation or requiring the filing as initial and integral steps in the regulatory scheme, and thus as presenting at the threshold of the scheme's application the question of the state's power to go further with it, is primarily a question of construction for the state courts to determine. In view of the Commission's position, as construed by the state supreme court, we cannot say that the only thing presently involved is the state's power to require the filing of information without reference to its further use for controlling these sales. Cf. *Arkansas Louisiana Gas Co.* v. *Department of Public Utilities*, 304 U. S. 61. Here the orders constituted "an unequivocal assertion of power" to regulate rates and service. Indeed they involve something more than a mere threat to apply the regulatory plan in its later phases. They represent the actual application of that plan in its initial stage. In such a situation appellant was not required to await a further regulatory order before contesting the Commission's jurisdiction. Cf. *Public Utilities Comm'n* v. *Gas Co.*, 317 U. S. 456.

This does not mean that we now express opinion concerning the validity of any further order which the Commission may enter. No such order is before us. It does mean that we are required to decide whether the sales in question lie within the scope of the state's power to regulate rates and service, so that some further order in those respects may or may not be entered.

Nor do we question that these sales are interstate transactions. The contrary suggestion left open in the state supreme court's treatment rests upon the view that gas transported interstate takes on the character of a commodity which has come to rest or broken bulk when it leaves the main transmission line and, under reduced pressure, enters branch lines or laterals irrevocably on its

way to final distribution or consumption. Those merely mechanical considerations are no longer effective, if ever they were exclusively, to determine for regulatory purposes the interstate or intrastate character of the continuous movement and resulting sales we have here.[7]

Thus gas furnished to local utilities for resale is supplied unquestionably, both as to transportation and as to sale, in interstate commerce. Yet it is subjected to practically identical changes in pressure with the gas sold by appellant directly for industrial use.[8] Neither practical common sense nor constitutional sense would tolerate holding that reduction in pressure makes the industrial sales to

[7] In *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498, 504, the Court referred to earlier decisions turned by "applying this mechanical test for determining when interstate commerce ends and intrastate commerce begins," namely, "upon the introduction of the gas into the service pipes of the distributor," and then stated: "In other cases, the Court, in determining the validity of state regulations, has been less concerned to find a point in time and space where the interstate commerce in gas ends and intrastate commerce begins, and has looked to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce. Cf. *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 185, 187, *et seq.*; *California* v. *Thompson*, 313 U. S. 109, 113, 114; *Duckworth* v. *Arkansas* [314 U. S.], p. 390." 314 U. S. at 505.

[8] Appellant's gas enters Indiana in a 22-inch main at a pressure of 250 pounds or more per square inch. In the state the gas enters a 16-inch branch line at a pressure of 200 pounds per square inch, and then a 6-inch lateral line at a pressure of 100 pounds per square inch. In the lateral line the gas is transported to two adjacent meter houses. From one house gas is delivered to Anchor-Hocking at pressures as low as 10 pounds per square inch, while from the other deliveries are made to a local distributing company at pressures ranging from 9 to 25 pounds per square inch.

Similarly, gas from other laterals stemming from appellant's main line is reduced to a pressure of 16 pounds per square inch before being furnished to the DuPont plant and to pressures of approximately 20 pounds per square inch for two utility companies served from the same lateral as the DuPont plant.

Anchor-Hocking wholly intrastate for purposes of local regulation while deliveries at similar pressures to utility companies remain exclusively interstate. Variations in main pressure are not the criterion of the states' regulatory powers under the commerce clause. Cf. *Interstate Gas Co.* v. *Power Comm'n*, 331 U. S. 682, 689. The sales here were clearly in interstate commerce.

The controlling issues therefore are two: (1) Has Congress, by enacting the Natural Gas Act, 52 Stat. 821, 15 U. S. C. § 717, in effect forbidden the states to regulate such sales as those appellant makes directly to industrial consumers; (2) if not, are those sales of such a nature, as related to the *Cooley* formula, that the commerce clause of its own force forbids the states to act.

We think there can be no doubt of the answer to be given to each of these questions, namely, that the states are competent to regulate the sales. The two questions may best be considered in the background of the legislative history of the Natural Gas Act and of the judicial history leading to its enactment in 1938.

Prior to that time this Court in a series of decisions had dealt with various situations arising from state efforts to regulate the sale of imported natural gas. The story has been adequately told [9] and we do not stop to review it again or attempt reconciliation of all the decisions or their groundings. Suffice it to say that by 1938 the Court had delineated broadly between the area of permissible state control and that in which the states could not intrude. The former included interstate direct sales to

[9] For a summary of the leading decisions concerning the sale and transportation of gas prior to the passage of the Natural Gas Act, see *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498, 504–505. See also Powell, Note, Physics and Law—Commerce in Gas and Electricity, 58 Harv. L. Rev. 1072; Howard, Gas and Electricity in Interstate Commerce, 18 Minn. L. Rev. 611.

local consumers, as exemplified in *Pennsylvania Gas Co.* v. *Public Service Comm'n*, 252 U. S. 23; the latter, service interstate to local distributing companies for resale, as held in *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, reinforced by *Public Utilities Comm'n* v. *Attleboro Co.*, 273 U. S. 83.

Shortly then, as the decisions stood in 1938, the states could regulate sales direct to consumers, even though made by an interstate pipe-line carrier. This was true of sales not only for domestic and commercial uses but also for industrial consumption, at any rate whenever the interstate carrier engaged in distribution for all of these uses.[10] On the other hand, sales for resale, usually to local distributing companies, were beyond the reach of state power, regardless of the character of ultimate use. This fact not only prevented the states from regulating those sales but also seriously handicapped them in making effective regulation of sales within their authority.[11]

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[10] Appellant contends that "wholesale," *i. e.*, large quantity, service direct to industrial consumers, as exemplified by its sales to Anchor-Hocking, is to be distinguished from the sales in *Pennsylvania Gas Co.* v. *Public Service Comm'n*, 252 U. S. 23, which were made in a manner commonly associated with a local distribution system supplying gas to consumers in a city. Nothing in the decision, however, requires it to be so limited. On the contrary, emphasis may rather be placed on the fact that both situations involve sales to ultimate consumers, Anchor-Hocking being just as clearly in that category as the "factories and residences" served by the company in the *Pennsylvania Gas Co.* case. See *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498, 505, where Chief Justice Stone, in summarizing the *Pennsylvania Gas Co.* case, stated that it involved gas "sold directly to ultimate local consumers"; *Jersey Central Co.* v. *Power Comm'n*, 319 U. S. 61, 78, 80 (dissenting opinion); Powell, Note, 58 Harv. L. Rev. 1072, 1082, quoted *infra* note 12.

[11] The *Attleboro* decision, 273 U. S. 83, had been made in the face of the Rhode Island Commission's finding that the Narragansett company in selling electric current interstate to the Attleboro company was suffering an operating loss while the rates to its other customers

This impotence of the states to act in relation to sales for resale by interstate carriers brought about the demand for federal regulation and Congress' response in the Natural Gas Act. To reach those sales and prevent the hiatus in regulation their immunity caused, the Act declared in § 1 (b):

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

This section determines the Act's coverage and does so in the light of the situation existing at the time. Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the

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yielded a fair return; and over the Commission's contentions grounded on that finding that it could not effectively regulate rates of the Narragansett company to its local consumers without also regulating its rates to the Attleboro company.

Compare the memorandum submitted on behalf of the National Association of Railroad and Utility Commissioners by its general solicitor, Mr. John E. Benton, Hearings before Committee on Interstate and Foreign Commerce on H. R. 4008, 75th Cong., 1st Sess. 141, 143: "Sales for industrial use ought not to be exempt from all regulation, for the result may very well be that unjustifiable discrimination will result, and there will be no commission to which complaint may be made. Sales for industrial uses plainly ought to be subject to regulation by the same Commission which regulates sales to other classes of consumers, so that just and reasonable rates, for the several classes of service, properly related to each other, may be established."

Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.

The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act "shall not apply *to any other . . . sale* . . ." (Emphasis added.) Those words plainly mean that the Act shall not apply to any sales other than sales "for resale for ultimate public consumption for domestic, commercial, industrial, or any other use." Direct sales for consumptive use of whatever sort were excluded.

The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise. And the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed.[12]

Moreover, this unusual legislative precision was not employed with any view to relieving or exempting any segment of the industry from regulation. The Act, though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the

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[12] ". . . [T]he Supreme Court has from the beginning allowed the state both to tax and to fix the price on the first sale or delivery of gas or electricity brought in from a sister state when and if this first sale is also necessarily the last sale because consummated by consumption."— Powell, Note, 58 Harv. L. Rev. 1072, 1082.

prior decisions.[13] The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way. This appears not merely from the situation which led to its adoption and the legislative history, including the committee reports in Congress cited above, but most plainly from the history of § 1 (b) in respect to the changes which took place in reaching its final form.[14]

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[13] In H. Rep. No. 709, 75th Cong., 1st Sess., the Committee on Interstate and Foreign Commerce said of the proposed bill which became the Natural Gas Act: "It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U. S. 23.) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri* v. *Kansas Gas Co.* (1924), 265 U. S. 298, and *Public Service Commission* v. *Attleboro Steam & Electric Co.* (1927) 273 U. S. 83.) The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act."

See also H. Rep. No. 2651, 74th Cong., 2d Sess. 1–3; Sen. Rep. No. 1162, 75th Cong., 1st Sess.

[14] In the hearings on H. R. 4008, the bill in the 75th Congress, the representative of several large pipe-line companies construed § 1 (b) as it then stood to exempt sales to industrial consumers from all regulation, state as well as federal, and proposed an amendment exempting sales for resale, when for industrial use only, from regulation under

It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption. Yet this, in effect, is what appellant asks us to do. For the essence of its position, apart from standing directly on the commerce clause, is that Congress by enacting the Natural Gas Act has "occupied the field," *i. e.*, the entire field open to federal regulation, and thus has relieved its direct industrial sales of any subordination to state control.

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the proposed legislation. Hearings before Committee on Interstate and Foreign Commerce on H. R. 4008, 75th Cong., 1st Sess. 124. In an answering memorandum, Mr. Benton pointed out the pipeline representative's misunderstanding of the purposes of § 1 (b), stating that "service to an industrial user is just as much a local service . . . as is a sale to a householder for domestic use . . . [and] until Congress occupies the field, a sale for industrial use is accordingly subject to State regulation . . . ." *Id.* at 143. He proposed an alternative amendment to render it clear beyond doubt that federal regulation of sales for resale extended to transactions where the gas was to be used for industrial purposes only. *Id.* at 142. Mr. Benton's amendment was adopted by the House committee and appears in substantially unaltered form in § 1 (b) of the Natural Gas Act as finally enacted. In H. Rep. No. 709, 75th Cong., 1st Sess., the committee emphasized that Mr. Benton and other representatives of state commissions and municipalities appeared in support of the bill.

In support of its position appellant relies in part on H. Rep. No. 800, 80th Cong., 1st Sess., favorably reporting H. R. 4051 amending the Natural Gas Act. This bill did not become law. The views expressed in the committee report made in 1947, some nine years after the Natural Gas Act's passage, are hardly determinative or, in juxtaposition with the contemporaneous history, persuasive of the congressional intent in passing that Act.

The exact opposite is the fact. Congress, it is true, occupied a field. But it was meticulous to take in only territory which this Court had held the states could not reach.[15] That area did not include direct consumer sales, whether for industrial or other uses. Those sales had been regulated by the states and the regulation had been repeatedly sustained. In no instance reaching this Court had it been stricken down.[16]

It is true that no case came here involving state regulation of direct industrial sales wholly apart from sales for other uses. In the cases sustaining state power, whether to regulate or to tax, the company making the industrial sales was selling also to domestic and commercial users.[17] But there was no suggestion, certainly no decision, that a different result would follow if only direct industrial sales were being made. Neither the prior judicial line nor the statutory line was drawn between kinds of use or on the relation between sales for different uses. Both lines were drawn between sales for use, of whatever kind, and sales for resale. Cf. *Colorado Interstate Co.* v. *Comm'n*, 324 U. S. 581, 595–596.

The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level. We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority.

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[15] See notes 12 and 13 *supra*.

[16] *Ibid.*

[17] *Pennsylvania Gas Co.* v. *Public Service Comm'n*, 252 U. S. 23, appears to be the only case flatly ruling the point for regulatory purposes. But its authority was clearly recognized in *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498, 505, cf. note 10 *supra*; *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298, 308; *Public Utilities Comm'n* v. *Attleboro Co.*, 273 U. S. 83, 87, and other cases, as well as in the congressional report quoted in note 13.

Public Utilities Comm'n v. *Gas Co.*, 317 U. S. 456, 467; *Power Comm'n* v. *Hope Gas Co.*, 320 U. S. 591, 609–610; *Interstate Gas Co.* v. *Power Comm'n*, 331 U. S. 682, 690. And, as was pointed out in *Power Comm'n* v. *Hope Gas Co.*, *supra* at 610, "the primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies." The scheme was one of co-operative action [18] between federal and state agencies. It could accomplish neither that protective aim nor the comprehensive and effective dual regulation Congress had in mind, if those companies could divert at will all or the cream of their business to unregulated industrial uses.[19]

The Natural Gas Act therefore was not merely ineffective to exclude the sales now in question from state control. Rather both its policy and its terms confirm that control. More than "silence" of Congress is involved. The declaration, though not identical in terms with the one made by the McCarran Act, 59 Stat. 33, 15 U. S. C. § 1011, concerning continued state regulation of the insurance business, is in effect equally clear, in view of the Act's historical setting, legislative history and objects, to show intention for the states to continue with regulation where Congress has not expressly taken over. Cf. *Prudential Ins. Co.* v. *Benjamin*, 328 U. S.

[18] The jurisdiction granted the Federal Power Commission by the Natural Gas Act necessitates close correlation with state regulatory bodies. Section 17 of the Act provides for cooperation between the federal and state agencies. See note 23 and text.

[19] Over 38 per cent of the gross revenues of the local Indiana utilities from the sale of gas is derived from service to the approximately 250 industrial consumers served by them. If service to any substantial number of the industrial users were to be taken over by appellant, the local utilities not only would suffer great losses in revenue, but would be unable to dispense with more than a trivial percentage of their plant properties. The resultant increase in unit cost of gas would lead necessarily to increased rates for the consumers served by the local companies.

408. Congress has undoubted power to define the distribution of power over interstate commerce. *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 769, and authorities cited; cf. *Prudential Ins. Co.* v. *Benjamin, supra.* Here the power has been exercised in a manner wholly inconsistent with exclusion of state authority over the sales in question.

Congress' action moreover was an unequivocal recognition of the vital interests of the states and their people, consumers and industry alike, in the regulation of rates and service. Indiana's interest in appellant's direct sales is obvious. That interest is certainly not less than the interest of California and her people in their protection against the evil effects of wholly unregulated sale of insurance interstate. *Robertson* v. *California*, 328 U. S. 440. Not only would industrial consumers in most instances go without protection as to rates and service other than that supplied by competition from other fuels,[20] but the state's regulatory system would be crippled and the efforts of the Indiana Commission seriously hampered in protecting the interests of other classes of users equally if not more important.[21]

As against these vital local interests, becoming more important with every passing year in the steady transition from use of more primitive fuels to natural gas and fuel oils, appellant seeks to set up its own interest in complete freedom from regulation and, if any is to be

[20] Pipe-line service, by the very physical conditions characterizing the industry and magnitude of investment required, acquires large monopolistic effects, more particularly in marketing areas distant from producing ones. Cf. *Power Comm'n* v. *Hope Gas Co.*, 320 U. S. 591, 610, n. 17 and text. Most often its competition is with other fuels rather than competing pipe lines.

[21] See note 19. Cf. *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346; *Robertson* v. *California*, 328 U. S. 440, 448; *Industrial Gas Co.* v. *Public Utilities Comm'n of Ohio*, 135 Ohio St. 408, 412; *In re Service Gas Co.*, 15 P. U. R. (N. S.) 202.

imposed, a supposed national interest in uniform regulation. The national interest, considered apart from its own, is largely illusory on this record. For itself, the company asserts that state regulation of prices and service will amount to a power of blocking the commerce or impeding its free flow.

There are two answers. One is experience. Insofar as this phase of the natural gas industry has been subjected to state regulation to date, those effects have not been shown to occur. The other answer, in case that experience should vary, is the power of Congress to correct abuses in regulation if and when they appear. State power to regulate interstate commerce, wherever it exists, is not the power to destroy it, unless Congress has expressly so provided.[22] It is the power to require that it be done on terms reasonably related to the necessity for protecting the local interests on which the power rests.

Appellant also envisages conflicting regulations by the commissions of the various states its main pipe line serves, particularly in relation to curtailment of service when weather conditions or others require it, and fears conflict also between the state commissions and the Federal Power Commission. It assigns these possibilities in support of its view that national uniform regulation alone is appropriate to its operations. There is no evidence thus far of substantial conflict in either respect[23] and we do not see that the probability of serious conflict is so strong as

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[22] *Kentucky Whip & Collar Co.* v. *Illinois Cent. R. Co.*, 299 U. S. 334; *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311; *United States* v. *Darby*, 312 U. S. 100.

[23] There is no evidence of any conflict in the asserted exercise of jurisdiction by the appellee Commission with any functions of the Federal Power Commission. In granting appellant permission under § 7 (c) of the Natural Gas Act to extend its facilities to serve the DuPont plant, see note 4 *supra*, the Federal Power Commission specifically provided that the order was "without prejudice to the

to outweigh the vital local interests to which we have referred requiring regulation by the states. Moreover, if such conflict should develop, the matter of interrupting service is one largely related, as appellees say, to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accommodation of any conflicting interests among various states.[24]

These considerations all would lead to the conclusion that the states are not made powerless to regulate the sales in question by any supposed necessity for uniform national regulation but that on the contrary the matter is of such high local import as to justify their control, even if Congress had remained wholly silent and given no indication of its intent that state regulation should be effective. But in this case, in addition to those considerations taken independently, the policy which we think Congress has clearly delineated for permitting and supporting state regulation removes any necessity for determining the effect of the commerce clause independently of action by Congress and taken as operative in its silence.

The attractive gap which appellant has envisioned in the coordinate schemes of regulation is a mirage. The judgment of the Supreme Court of Indiana is

Affirmed.

MR. JUSTICE JACKSON concurs in the result.

MR. JUSTICE MURPHY took no part in the consideration or decision of this case.

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authority of the Indiana Commission in the exercise of any jurisdiction which it may have over the sale or service proposed to be rendered by Panhandle Eastern to du Pont." Cf. note 18.

[24] See note 23.